Office - Supreme Court, U.S.
FILED
NOV 1 1 1956
JOHN T. FEY, Clerk

No. 576

IN THE

Supreme Court of the United States

October Term, 1956

IRVING A. ROSENBLUM,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FREDERICK H. BLOCK
Attorney for Petitioner
295 Madison Avenue
New York 17, N. Y.

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statutes Involved	3
Statement	4
Reasons for Granting the Writ	7
I. The petitioner was erroneously convicted of the felony charged because the proof established only the commission of a misdemeanor	7
II. The Trial Court erred in restricting Petitioner's use of the minutes of his co-defendant's testimony before the Grand Jury	8
III. Review should be had herein in order that the question left open by the *Berra* case be definitely resolved	9
Conclusion	11
Appendix A—Opinion	13
Appendix B—Opinion on Rehearing	25

PAGE

CITATIONS:

Cases:

Berra v. United States, 351 U. S. 131 ..... 4, 6, 10

Spies v. United States, 317 U. S. 492 ..... 2, 3, 5, 7

Statutes:

Title 26, U. S. Code (1939 I. R. C.):

Section 145(b) 9

Section 1718(a) 3, 7

Section 1718(b) 3, 9

Section 3616(a) 4, 10

IN THE

Supreme Court of the United States

October Term, 1956

IRVING A. ROSENBLUM,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Honorable Associate Justices of the Supreme Court of the United States:

Irving A. Rosenblum, your petitioner, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinion Below

The opinion of the Court below (Appendix A, *infra,* p. 13), as amended (Appendix B, *infra,* p. 25), is reported in the original version in 236 F. 2d 502 (Advance).

Jurisdiction

The judgment of the Court below was entered on August 20, 1956. A timely petition for rehearing was filed on August 31, 1956 and was denied on October 15, 1956 (p.

22a, 23a and 46a of proceedings in court below). The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, §1254(1).

Questions Presented

I

Was there sufficient evidence under the rule of *Spies* v. *United States*, 317 U. S. 492, of petitioner's intent to evade and defeat taxes where the only evidence of an affirmative act of evasion (apart from the filing of false returns) was petitioner's denial to a government agent of the existence of an inconsequential record summarizing data already known to be in the agent's hands?

II

Were the restrictions, imposed by the trial judge on petitioner's use on cross-examination of his co-defendant, of her grand jury testimony, so gravely prejudicial as to warrant reversal?

III

Was petitioner, charged with wilfully attempting to evade and defeat the payment of taxes by filing false and fraudulent returns, properly sentenced to 18 months' imprisonment on each count, to run concurrently, under §1718 (b) of the Internal Revenue Code of 1939, instead of under §3616(a) of the Internal Revenue Code of 1939 which provides for maximum imprisonment of one year?

Statutes Involved

The *felony* statute *cited* in all the indictments is Title 26, §1718(b), U. S. Code (1939 I. R. C.), which reads as follows:

"1718. Penalties— * * *

(b) Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisonment for not more than five years, or both, together with the costs of prosecution."

The *misdemeanor* statute which petitioner contends governs the offenses *proved,* under *Spies* v. *United States,* 317 U. S. 492, is Title 26, §1718(a) U. S. Code (1939 I. R. C.), which reads as follows:

"1718. Penalties—

(a) Any person required under this chapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this chapter, who wilfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or

imprisoned for not more than one year, or both, together with the costs of prosecution."

The *misdemeanor* statute which petitioner contends specifically governs the offenses *charged*, under *Berra* v. *United States*, 351 U. S. 131, is Title 26, §3616(a), U. S. Code (1939 I. R. C.), which reads as follows:

"3616. Penalties.—Whenever any person—

(a) False returns.—Delivers or discloses to the collector deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made, * * * he shall be fined not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

Statement

Eight multi-count indictments are here involved (Record, pp. 2346, 2468, 2476, 2484, 2492, 2500, 2507, 2516). Each alleges attempted evasion by one of several corporations of admissions taxes by the filing of false and fraudulent returns over periods running in most instances from June, 1946 to April, 1949. Each count sets forth the date of filing one admissions tax return, the month for which the return was filed, the tax reported, and the amount actually due. Petitioner and one Jeanne Ansell were charged as aiders and abettors. The indictments were consolidated and the trial proceeded before Honorable Vincent L. Leibell, United States District Judge, and a jury. Petitioner offered no evidence in his own behalf except for character testimony by outstanding citizens of the community (1176-1206*). He was found guilty on all counts.

---

* These numerical references are to pages of the typewritten trial transcript.

As regards petitioner, the sole issue at the trial was his intent in preparing and filing the admittedly false returns. He was the accountant for Miss Ansell who owned and operated the theatres involved and, in that capacity, had taken careful steps to assure that proper admissions taxes would be paid, all of which pointed to an innocent rather than a criminal intent. Among other safeguards, he devised a form for use by the cashiers in the individual theatres for reporting receipts attributable to admissions taxes (81, 82); he also had special accounts opened for the receipt of the tax monies, even though segregation of such funds was not required by law (956, 464-6).

The understatement of taxes aggregated some $200,000 (2005-6). Petitioner did not share in this. The justification for his filing false returns, which he was not allowed to bring to the jury's attention,* was that he knew that a government audit would be made and that the deficiencies would then be determined from the records and liquidated.

When Treasury agents came in to make their audit, petitioner, as the accountant, placed records at their disposal which showed at once the taxes which had been underreported and enabled them accurately to compute the taxes due (64-6, 82-3, 106).

The court below, recognizing that the rule of *Spies* v. *United States,* 317 U. S. 492, required proof of an affirmative act of evasion other than the mere false filing, held that petitioner's denial to a government agent of the existence of some secondary records constituted the requisite proof. This was error, as we show below at page 7.

When Miss Ansell took the stand in her own defense, she denied that petitioner had advised her to preserve her

---

* This error is discussed *infra,* p. 8.

records so that the government would be able to bill her for any balance found to be due after audit (1695-6). Impeaching evidence on this point which bore strongly on petitioner's lack of fraudulent intent was contained in the minutes of testimony which the witness had given before the grand jury, but the rulings of the trial judge prevented petitioner from using it (1684).

In moving to dismiss at the end of the government's case, counsel for petitioner called the trial court's attention to the decision of this Court in *Berra* v. *United States,* 351 U. S. 131, in urging that this prosecution was for a misdemeanor rather than a felony. The court ruled that the prosecution was for a felony (1134-41) and submitted the case to the jury on that theory (2185).

Petitioner was sentenced for the felony to 18 months' imprisonment on each count, to run concurrently, although the maximum sentence for a misdemeanor is one year on each count. Although the court below refused to remand for resentencing, Judge Frank, who wrote the opinion, expressed grave doubt as to whether *Berra* does not require that petitioner be resentenced under the misdemeanor statute (App. A, p. 16). The Solicitor General of the United States has made clear his view that *Berra* requires clarification.

Reasons for Granting the Writ

I

The petitioner was erroneously convicted of the felony charged because the proof established only the commission of a misdemeanor.

The court below, in both its original opinion (App. A, p. 17) and in its opinion, as amended (App. B, p. 26) construed *Spies* v. *United States,* 317 U. S. 492 (correctly, in our view) as requiring more than the mere filing of false returns (a misdemeanor under Title 26, §1718(a), U. S. Code, 1939 I. R. C.) to constitute an attempt to evade and defeat. It found the necessary additional proof in testimony by a government agent that petitioner had denied to him that monthly summary sheets existed (1888).

Petitioner had never disclaimed knowing that the returns were false. It is impossible to perceive, therefore, what fraudulent intent petitioner could have had for denying the existence of the summary sheets or how he could hope thereby to forestall or hamper the investigation. The sheets were mere summaries of the daily tally sheets which petitioner had furnished at the inception of the investigation and which the agents had duplicated (64, 69-70). The record is clear that, in fact, the denial of the existence of the sheets did not delay the government investigators. The court below was in error in finding to the contrary (App. A, pp. 15, 18). The request for the summary sheets was only made in 1950 (1889); yet the agents had completed preparing their own summary sheets by November, 1949 (63-4, 116-18).

The denial in question related to an inconsequential matter. Petitioner stands convicted of a felony, therefore,

on proof which established only commission of a misdemeanor.

II

The Trial Court erred in restricting Petitioner's use of the minutes of his co-defendant's testimony before the grand jury.

The court below held that the trial judge was wrong in the restrictions he imposed on petitioner in the use of Miss Ansell's grand jury testimony, but found that petitioner was not prejudiced by the rulings (App. A, pp. 22-4). The grand jury minutes, under seal, will be furnished to this Court in connection with this application. We respectfully ask that they be read by this Court with a view to ascertaining whether petitioner was prejudiced by being unable to use them freely, as the court below concedes he had a right to do. The attention of this Court is especially invited to that portion of the minutes directly impeaching Miss Ansell's denial that she had discussed a government audit with petitioner (1695-6), which reads as follows:

> "Ever since January 1944 when I first began to lease and operate theatres I have religiously kept all of my records. These records disclose the total amount of admissions received in the theatres operated by me and the Admissions Tax. * * * I kept these records because I was instructed by Mr. Irving Rosenblum that it was very important that I should do so. * * * I never intended to mislead the government when I filed the form indicating the admissions tax I was paying, because I was advised by Mr. Rosenblum that the Government would ultimately make a thorough audit and bill me for the balance of the admissions tax found to be properly due. For that reason, in

accordance with Mr. Rosenblum's directions, I kept my records intact and promptly turned them over to the Government's agents when they first requested them."

We suggest that the court below ignored the possibility that use of the foregoing for impeachment, barred explicitly by the trial judge (1684), might easily have elicited testimony from Miss Ansell which would have persuaded the jury to acquit petitioner.

III

Review should be had herein in order that the question left open by the *Berra* case be definitely resolved.

The petitioner was indicted under the provisions of the Internal Revenue Code of 1939. Each count of the several indictments alleges that he

"* * * did wilfully and knowingly attempt to defeat and evade a large part of the admissions taxes due and owing by said corporation to the United States of America for the months and in the approximate amounts hereinafter set forth by filing and causing to be filed * * * false and fraudulent admissions tax returns * * *"

§1718(b) of the Internal Revenue Code of 1939 (the counterpart, with respect to admissions taxes, of §145(b) of the Internal Revenue Code of 1939 applicable to income taxes) provides in part that:

"Any person * * * who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter, or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony

> and upon conviction thereof be fined not more than $10,000 or imprisoned for not more than five years, or both, together with the costs of prosecution."

Under the same Internal Revenue Code of 1939, §3616(a) provides in part that any person

> "who delivers or discloses to the collector or deputy any false or fraudulent * * * return * * * with intent to defeat or evade the * * * assessment intended to be made * * * shall be fined not exceeding $1,000, or imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution."

§3616(a) makes the specific act, such as was here involved, of filing or disclosing to the collector "any false or fraudulent * * * return * * * with intent to defeat and evade the * * * assessment intended to be made" a misdemeanor.

This Court in *Berra,* in the view of Judge Frank, indicated that the offense of tax evasion by filing false and fraudulent returns might be a misdemeanor. Because of the doubt surrounding this Court's decision, we think this case should be reviewed. This case is a proper subject for such review because the *Berra* point was raised in the trial court (1134-41). The Solicitor General of the United States in the brief in opposition to the pending petition for certiorari filed in *Moran* v. *United States,* No. 417, expressed agreement with this view:

> "Although it is desirable that the question [involved in the *Berra* case] be definitely resolved, the Court may consider that review by it should await the arrival of a petition and record properly presenting the issue."

If the Court ultimately should grant review, the issue in this case is not restricted to the question of whether or

not petitioner received a proper sentence. It also involves the question whether he was so prejudiced by submission of the case to the jury as a "felony" (2185) as to warrant a new trial. Under the unusual circumstances disclosed here, the jury might well have voted to acquit a man of petitioner's sterling background and reputation had the charges been submitted as mere misdemeanors.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York
November 12, 1956.

Respectfully submitted,

FREDERICK H. BLOCK
Attorney for Petitioner
295 Madison Avenue
New York 17, N. Y.

APPENDIX A

Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 392—October Term, 1955.

(Argued June 8, 1956 Decided August 20, 1956.)

Docket No. 24001

UNITED STATES OF AMERICA,

Appellee,

—v.—

H. J. K. THEATRE CORPORATION, JEANNE ANSELL and IRVING A. ROSENBLUM,

Appellants,

—and—

UNITED STATES OF AMERICA,

Appellee,

—v.—

JEANNE ANSELL, IRVING A. ROSENBLUM, H. J. K. THEATRE CORPORATION, K. B. THEATRE CORPORATION, K. L. THEATRE CORPORATION, ANSELL THEATRE CORPORATION, X. K. THEATRE CORPORATION, M. A. K. THEATRE CORPORATION, T & J THEATRE CORPORATION, K. A. S. THEATRE CORPORATION, J. A. THEATRE CORPORATION,

Appellants.

Before:

FRANK, HINCKS and WATERMAN,

Circuit Judges.

Appeal from judgments of conviction entered upon a jury's verdict of guilty, in the Southern District of New York. Affirmed.

PAUL W. WILLIAMS, U. S. Attorney for the Southern District of New York (Dennis C. Mahoney, Assistant U. S. Attorney, of Counsel), *Attorney for the United States of America.*

BLOCK & BLOCK, New York City (Frederick H. Block and Robert B. Block, of Counsel), *Attorneys for Appellant Rosenblum.*

BERNARD AUSTIN (Isadore B. Hurwitz, of Counsel), *Attorney for Appellant Ansell and Corporate Appellants.*

FRANK, *Circuit Judge*:

Nine indictments and one information were consolidated for trial, and are consolidated for this appeal. In each of the first eight indictments, Jeanne Ansell, Irving Rosenblum and one of the several corporate defendants were charged in numerous counts with wilfully attempting to defeat and evade the payment of admissions taxes due the United States during the period May 1946 through March 1949 by filing false and fraudulent returns in violation of 26 U. S. C. Section 1718(b).[1] The ninth indictment charged

[1] Section 1718(b): "Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Ansell and the J. A. Theatre Corporation with wilfully failing to account and pay over admissions taxes due the United States, in violation of 26 U. S. C. Section 1718(b). Both offenses charged under Section 1718(b) are felonies. The sole information charged Ansell and the J. A. Theatre Corporation with wilfully failing to file an admission tax return in violation of 26 U. S. C. Section 1718(a),[2] a misdemeanor.

Defendant Ansell was the president and apparently the owner of the corporate defendants. Rosenblum was the corporations' accountant and, at various times, was the treasurer of many of them. The corporations owned the leases of several motion picture theatres in which foreign films were exhibited. Defendants concede that the monthly admissions tax returns were false. But, at the trial, Ansell and Rosenblum each sought to place the blame for the filing of the fraudulent returns on the other.

There was evidence from which the jury could reasonably find the following: Ansell owned and operated the chain of theatres whose leases were owned by the corporate defendants; daily work sheets showing the amounts of taxes due the Government were prepared; from these, monthly summaries were made up; both Ansell and Rosenblum attempted to conceal the existence of the monthly summaries from the Government agents; during part of the

---

[2] Section 1718(a): "Any person required under this chapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this chapter, who wilfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

indictment period, the tax monies that were collected were deposited in a special bank account, but Ansell drew checks on this account for purposes other than the payment of taxes; Rosenblum had an interest in a corporation which had made loans to some of the corporate defendants; the tax returns were prepared by Rosenblum each month and signed by either him or Ansell; the J. A. Theatre Corporation never filed any return; all the filed returns substantially understated the total tax actually collected.

The jury found all the defendants guilty on all of the counts in which they were named. The trial judge fined each of the theatre corporations $500 on each count in which they were named, for a total of $106,000. The individual defendants, Ansell and Rosenblum, were each fined $100 for each count, for a total of $21,200 for Ansell and $21,000 for Rosenblum. In addition, Ansell was sentenced to a 2 year prison term on all the felony counts and to a 1 year term on each of the misdemeanor counts, sentence on all counts to run concurrently. Rosenblum received an 18 month concurrent prison sentence on each count. All the defendants appeal and raise a variety of grounds for reversal.

1. All defendants raise two objections which we shall consider first.

(1) Defendants, relying on *Berra* v. *United States,* 351 U. S. 131, contend that we should remand for resentencing under 26 U. S. C. 3616(a). They also suggest that the *Berra* case may require dismissal of the indictments. We reject defendants' contention for reasons stated in *United States* v. *Moran,* —— F. 2d —— (C. A. 2, / /56).

The writer of this opinion has some doubt about that reasoning. The question considered by the Supreme Court in *Berra* was confined to the rejected request for an in-

struction to the jury. The Court did not discuss *Spies* v. *United States,* 317 U. S. 492 or *United States* v. *Beacon Brass Co.,* 344 U. S. 43. If those cases were pertinent, it would seem that the Court would have affirmed, merely citing those cases. There is language in *Berra* which can be read as holding that the coverage of the two statutes is in all respects identical, and that the question as to which statute applied was not for the jury but solely for the judge when he came to sentencing. *Berra* can then perhaps be construed to mean that the judge improperly imposed the sentence for conviction of a felony. On that interpretation, we should, in the instant case, remand for resentencing under the misdemeanor statute. However, the writer is not sure enough about the above interpretation of *Berra* to justify his dissenting here.

(2) Defendants further contend that, even if they were properly indicted for felonies under Section 1718(b), yet the evidence was insufficient to prove "wilful" violation under the rule of *Spies* v. *United States,* 317 U. S. 492. In *Spies,* the defendant was indicted under a subsection of the Internal Revenue Code, similar to Section 1718(b), which made it a felony to wilfully attempt, "in any manner," to evade or defeat any tax. Another subsection made it a misdemeanor to wilfully fail to pay a tax or fail to make a return. Defendant was indicted for wilfully attempting to evade the income tax by failing to file a return or to pay a tax. The Supreme Court held that mere proof of a knowing failure to file a return or to pay a tax, without proof of any affirmative act of evasion on the part of the taxpayer, was insufficient to establish "wilfulness" under the felony provision. We think the *Spies* case is distinguishable from the case at bar: (a) If *Spies* is read to require some overt act evincing an "evil motive" to evade taxes (as compared with a wilful omission), then we think proof here of the wilful and knowing filing of

the false returns is sufficient. (b) Even if the *Spies* case is read to mean that where, as here, the "manner" of evading taxes alleged in the indictment constitutes a misdemeanor, in and of itself,[3] some additional overt act tending to show an evil motive, and not necessary to prove the misdemeanor, must be shown,[4] we think *Spies* inapposite since such an overt act was here proved. There was evidence from which the jury could reasonably have found beyond a reasonable doubt that both Rosenblum and Ansell had concealed the existence of the monthly summaries of the admissions taxes from the Government. Rosenblum lied to a Government agent concerning these summaries, telling the agent that they did not exist. Ansell failed to reveal their existence when questioned by a Government agent concerning the method by which she obtained the figures for making up the tax returns. She stated that she obtained the figures from the employees in her office. These monthly summaries were never turned over to the Government. Consequently, many hours were spent assembling the information which the defendants had in summary form.

2. Ansell raises several additional points which we think are without merit:

We think the trial judge did not "abuse" his discretion in refusing separate trials. Rules 8(b) and 13 of the Federal Rules of Criminal Procedure; *United States* v. *Lebron*, 222 F. 2d 531, 535 (C. A. 2).

Ansell alleges that certain corporate checks and other records were obtained illegally by the Government, and

---

[3] Under 26 U. S. C. Section 3616(a), the filing of a false or fraudulent return with intent to defeat or evade "the assessment intended to be made," constitutes a misdemeanor. The Supreme Court has held this section intended to punish the same conduct as Section 1718(b). *Berra* v. *United States*, 350 U. S. 131.

[4] *Clay* v. *United States*, 218 F. 2d 483 (C. A. 5).

claims the trial judge erred in denying her motion to suppress. These records were voluntarily turned over to the Government by Rosenblum, a corporate officer. As to the corporate records, we think Rosenblum had apparent and actual authority to give them to the Government and that there was no unlawful seizure. *Zap* v. *United States,* 328 U. S. 624; *United States* v. *Wolrich,* 119 F. Supp. 538. In any event, Ansell may not assert the constitutional rights of the corporations in her own behalf. *Lagow* v. *United States,* 159 F. 2d 245 (C. A. 2). As to Miss Ansell's personal checks, assuming *arguendo* that they were illegally obtained, we think their reception in evidence was harmless. Their use as evidence was indeed beneficial to her, since they tended to establish that she had spent personal funds for corporate purposes, thereby reimbursing the corporation for funds withdrawn by her.

The trial judge did not err in refusing Ansell's requested charge that the Government agents acting as witnesses were interested witnesses. The judge's charge on this point was adequate.

The final issue raised by Ansell is that the trial judge erred in not further limiting her cross-examination and the summation to the jury by Block, Rosenblum's attorney. Block had been the attorney for both Ansell and Rosenblum at the time Ansell appeared before the Grand Jury. He was later discharged by her but continued as Rosenblum's lawyer. No objection was made to Block's thus serving as Rosenblum's lawyer until he sought to cross-examine Ansell concerning her appearance before the Grand Jury.

We assume, *arguendo,* that Ansell correctly argues as follows: Where, as here, an attorney had represented two persons who later become defendants in a criminal prosecution, he remains under an obligation not to reveal any

confidential communications made to him by either of these clients.[5] But even assuming that argument were correct, it would have no application here. For a careful examination of the record fails to reveal any such impropriety by Block. He based his cross-examination of Ansell on subpoenaed records, records obtained from the Government, a letter written to the Grand Jury, testimony of other witnesses at the trial which contradicted Ansell's testimony, and that part of Ansell's Grand Jury testimony which was made available to him by the trial judge.

Nor do we think Block's summation exceeded the bounds of proper advocacy. Although he attacked Ansell's credibility, nevertheless the testimony of the Government's witnesses, and Ansell's testimony on cross-examination by the Government and Block, amply justified his remarks. In addition, some of his remarks were in answer to questions, concerning his own character and integrity, raised by Ansell's testimony. He had a right so to reply. McCormick, Evidence (1954) page 194. If the jury was adversely affected by the fact that Ansell's former lawyer was critical of her, the fault was Ansell's, since Block's former representation of her was first brought out by her own lawyer at the trial, on his direct examination of Ansell.

3. Rosenblum's only additional contention is that the trial judge erred in restricting his attorney's access to the Grand Jury testimony of Ansell and in limiting the use of the disclosed Grand Jury testimony in his cross-examination of Ansell. After the Government had used Miss An-

---

[5] See McCormick, Evidence (1954) pp. 192-193; 8 Wigmore, Evidence, Section 2312; Anno. 141 A. L. R. 562; *Root* v. *Wright*, 84 N. Y. 72, 76; *People* v. *Abair*, 228 P. 2d 336; *People* v. *Kor*, 277 P. 2d 94; *State* v. *Archuleta*, 217 Pac. 619, 621; cf. *People* v. *Ferandez*, 301 N. Y. 302, 336-343.

sell's Grand Jury testimony to impeach her,[6] Rosenblum's counsel asked to see the remainder of Ansell's Grand Jury testimony in order to impeach her. We do not think that he was entitled to have access to all of her testimony. However, where, as here, it is shown or alleged that the trial testimony of a witness against the defendant is contradictory of the witness' testimony before a Grand Jury, the rule in this circuit is that the defendant must be permitted to use the contradictory Grand Jury testimony to impeach the witness. The proper procedure is for the trial judge to read the Grand Jury minutes to determine whether the witness' trial testimony is contradictory; if it is, the judge should disclose to defendant that part of the witness' Grand Jury testimony which contradicts the witness' trial testimony; and if not, and if the defendant so requests, the judge should seal the witness' complete Grand Jury testimony and make it part of the record on appeal.[7]

---

[6] It is suggested that the Government, by using a portion of the Grand Jury minutes to impeach Ansell, waived its privilege to keep the balance secret. See *United States* v. *Krulewitch*, 145 F. 2d 76, 79 (C. A. 2); *United States* v. *Beekman*, 155 F. 2d 580, 584 (C. A. 2). We leave that question open.

[7] *U. S.* v. *Alper*, 156 F. 2d 222, 226 (C. A. 2); *U. S.* v. *Lebron*, 222 F. 2d 531, 536 (C. A. 2); *U. S.* v. *Cohen*, 145 F. 2d 82, 92 (C. A. 2); *U. S.* v. *Krulewitch*, 145 F. 2d 76, 78 (C. A. 2); *U. S.* v. *De-Normand*, 149 F. 2d 622, 625-626 (C. A. 2); *U. S.* v. *Beekman*, 155 F. 2d 580, 583-584 (C. A. 2).

The Government contends that *Remington* v. *United States*, 191 F. 2d 246, 261 (C. A. 2) should be construed to hold that, before a defendant may even inspect a witness' contradictory Grand Jury testimony, he must lay a foundation similar to that required before he introduces into evidence prior inconsistent statements. This interpretation of *Remington* we think is not warranted. Since the *Krulewitch* case, *supra*, which the Court cited in *Remington*, held precisely the opposite, and since the *Cohen* case, *supra*, also cited by the Court, contains no indication of such a requirement, we are loath so to interpret *Remington* so as to require this foundation. No other case in this circuit has imposed this additional requirement for the mere disclosure (as

The trial judge in this case did not follow this procedure. Instead, he ruled that he would read into the record only that portion of Ansell's Grand Jury testimony which related to two matters on which the Government had cross-examined her, i.e., (1) her claim that she thought that the tax returns filed were only for part payment, and (2) the monthly tax summaries. However, the testimony actually read into the record also revealed (3) that Rosenblum had set up a separate tax account, and (4) that Ansell had given the tax figures to Rosenblum who made out the tax returns. In addition, Block had a copy of a prepared statement that Ansell had read to the Grand Jury.

The trial judge also ruled that he would limit Block's cross-examination of Ansell with respect to her Grand Jury testimony to only the two matters brought out by the Government in its cross (i.e., points (1) and (2) *supra*). He so ruled after Ansell's counsel objected to the cross-examination of his client by Block (who had represented her at the time of the Grand Jury hearing).

We think that Rosenblum's attorney was entitled to have all of Ansell's contradictory Grand Jury testimony read into the record and that he was entitled to cross-examine her concerning this testimony free from the limitations imposed by the trial judge. Statements made to a Grand Jury are not confidential communications which come with-

---

opposed to use as evidence) of contradictory Grand Jury or other privileged testimony. Of course, if defendant seeks to introduce the contradictory statements in evidence, he must lay a proper foundation. McCormick, Evidence (1954), Section 37.

In any event, in this case, the trial judge made it impossible for Rosenblum's attorney to lay the foundation apparently required by *Remington*, since he very clearly ruled that Rosenblum's attorney was to limit his cross-examination concerning Ansell's Grand Jury testimony to only the two matters touched upon by the Government in its cross-examination of Ansell.

in the attorney-client privilege. McCormick, *supra,* Sections 93, 95; 8 Wigmore, Evidence, Section 2311. The modern justification of the privilege is that it encourages full disclosure by a client to his lawyer and thereby promotes the interests of justice. 8 Wigmore, *supra,* Section 2291; McCormick, *supra,* Section 91. This purpose is not furthered by restricting an attorney's access to and use of Grand Jury testimony by a former client.

However, after examining the Grand Jury testimony by Ansell, which was sealed and made part of the record on appeal, and after comparing it with the trial testimony, we think that all the points in Ansell's Grand Jury testimony, which contradicted her trial testimony and which supported Rosenblum's defense, were adequately brought out at the trial. The testimony at the trial covered the following points which Rosenblum claims he was prevented from proving by the trial judge's rulings: (1) Rosenblum gave instructions that a special tax account be opened;[8] (2) Ansell had used the special tax account for purposes other than the payment of taxes;[9] and (3) Ansell had supplied Rosenblum with the figures for the tax returns.[10] Furthermore, Rosenblum's defense was assisted by the testimony of a Government witness that Ansell had stated to the witness that the entire fault was hers and that Rosenblum was not to blame for the filing of the false

---

[8] On direct examination by her attorney, Ansell testified that she thought Rosenblum had given instructions to open up a special tax account. On cross-examination, she testified that Rosenblum had never instructed her to open this account. Although her Grand Jury testimony would have tended to impeach this latter statement, we do not think that its exclusion by the trial judge was so prejudicial as to justify a new trial.

[9] This was adequately brought out by the Government.

[10] This was shown by the testimony of Government witnesses, and was brought out again on the cross-examination of Ansell by the Government and Block.

returns. Rosenblum's lawyer stressed this point again in his cross-examination of Miss Ansell. We are satisfied that the unrevealed portion of Ansell's Grand Jury testimony contained nothing which would have added weight to the impeachment of her trial testimony touching Rosenblum, impeachment already accomplished by that portion of her Grand Jury testimony which was read to the trial jury at the Government's behest. Thus the effect of the rulings made was not to leave her trial testimony against Rosenblum unimpeached. When her trial testimony as to a particular fact had been impeached by one passage in her prior testimony, we think it lay within the trial court's discretion to prevent, as unduly time-consuming and unimportantly cumulative, an inspection of, and cross-examination on, other passages in her previous testimony given as to the same matters on the same occasion before the Grand Jury. Indeed, the verdict against Ansell imports that the jury rejected her trial testimony to the effect that Rosenblum was solely to blame. This accomplished, further impeachment of her trial testimony could scarcely have affected the verdict against Rosenblum.

Affirmed.

APPENDIX B

Opinion on Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 392—October Term, 1955.

(Petitions filed August 31, 1956 and September 4, 1956
Decided October 15, 1956.)

Docket No. 24001

UNITED STATES OF AMERICA,

Appellee,

—v.—

H. J. K. THEATRE CORPORATION, JEANNE ANSELL and IRVING A. ROSENBLUM,

Appellants,

—and—

UNITED STATES OF AMERICA,

Appellee,

—v.—

JEANNE ANSELL, IRVING A. ROSENBLUM, H. J. K. THEATRE CORPORATION, K. B. THEATRE CORPORATION, K. L. THEATRE CORPORATION, ANSELL THEATRE CORPORATION, X. K. THEATRE CORPORATION, M. A. K. THEATRE CORPORATION, T & J THEATRE CORPORATION, K. A. S. THEATRE CORPORATION, J. A. THEATRE CORPORATION,

Appellants.

Before:

FRANK, HINCKS and WATERMAN,

Circuit Judges.

On Petitions for Rehearing by Appellant Rosenblum and by Appellant Ansell and Corporate Appellants.

BLOCK & BLOCK, New York City (Frederick H. Block, of Counsel), *Attorneys for Appellant Rosenblum.*

BERNARD AUSTIN, New York City, *Attorney for Appellant Ansell and Corporate Appellants.*

PER CURIAM:

The petitions for rehearing are denied.

The opinion of the court is amended by substituting for the sentence beginning in the last line on page 2075 [5th line from the bottom of p. 17, *supra*] and the two subsequent sentences (on the top of page 2076) the following: "We think the *Spies* case is distinguishable from the case at bar for here there was evidence from which the jury could reasonably have found beyond a reasonable doubt not only the wilful and knowing filing of false returns but also that both Rosenblum and Ansell had concealed the existence of the monthly summaries of the admission taxes from the Government."

No. 577

FILED
NOV 14 1956
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM—1956

UNITED STATES OF AMERICA,

Appellee,

against

JEANNE ANSELL, H. J. K. THEATRE CORPORATION, K. B. THEATRE CORPORATION, K. L. THEATRE CORPORATION, ANSELL THEATRE CORPORATION, X. K. THEATRE CORPORATION, M. A. K. THEATRE CORPORATION, T. & J. THEATRE CORPORATION, K. A. S. THEATRE CORPORATION, J. A. THEATRE CORPORATION,

Appellants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BERNARD AUSTIN,
Attorney for Petitioner-Appellant Ansell and Corporate Petitioner-Appellants,
401 Broadway,
New York 13, N. Y.

ISADORE B. HURWITZ,
Of Counsel,
401 Broadway,
New York 13, N. Y.

INDEX

	PAGE
Opinions Below	2
Jurisdiction	3
Questions Presented	3
Constitutional Provisions and Statutes Involved	4
Statement and Necessary Facts	6
Appellant Ansell's Testimony	9
The Improper Cross-Examination and Summation	10
The Illegal Search and Seizure	19
Reasons for Granting the Writ	26
Argument	27
Appendix	
Opinion of Court of Appeals	1a
Opinion of Court of Appeals Denying Rehearing	12a
Order Denying Rehearing	14a
Judgment of Affirmance	15a

AUTHORITIES

Berra v. *U. S.*, 351 U. S. 131 ..... 4, 26, 27, 36
Boyd v. *U. S.*, 116 U. S. 616 30

Clay v. *U. S.*, 218 Fed. 2nd 483, 5 Cir. 35, 37

Glasser v. *U. S.*, 315 U. S. 60 ..... 27, 29, 30
Gouled v. *U. S.*, 255 U. S. 298 31

Lagow v. *U. S.*, 159 Fed. 2nd 245, 2 Cir. 32

Nardone v. *U. S.*, 308 U. S. 338 33

PAGE

People v. *Abair*, 102 Cal. App. 2nd 765, 228 Pac. 2nd 336 27
People v. *Fernandez*, 301 N. Y. 302 ..... 28, 29
People v. *Fisher*, 249 N. Y. 419 ..... 28, 29
People v. *Gerold*, 265 Ill. 448, 107 N. E. 165 27

Rezutek v. *U. S.*, 147 Fed. 2nd 142, 2 Cir. 32
Root v. *Wright*, 84 N. Y. 72 28

Silverthorne Lumber Co. v. *U. S.*, 251 U. S. 385 30
Smith v. *U. S.*, 337 U. S. 137 33
Spies v. *U. S.*, 317 U. S. 492 ..... 4, 26, 27, 34
State v. *Archuletta*, 29 New Mex. 25, 217 Pac. 619 .. 27, 28

U. S. v. *Coplon*, 185 Fed. 2nd 629, 2 Cir. 33
U. S. v. *Daisart Sportswear Inc.*, 169 Fed. 2nd 856, reversed sub nom *Smith* v. *U. S.*, 337 U. S. 137 32
U. S. v. *Goldstein*, 120 Fed. 2nd 485, aff'd. 316 U. S. 114 33
U. S. v. *Linderman*, 32 Fed. Sup. 123 32
U. S. v. *Lipschitz*, 132 Fed. Sup. 519 ..... 32, 33
U. S. v. *Moran*, 236 Fed. 2nd 361 36
U. S. v. *Sully*, 56 Fed. Sup. 942 32

Von Moltke v. *Gillies*, 332 U. S. 708 ..... 27, 30

Zap v. *U. S.*, 328 U. S. 624 ..... 31, 32

CONSTITUTION AND STATUTES

Fourth Amendment 4
Fifth Amendment 4
Sixth Amendment 5
Title 26, U. S. C. Sec. 1700 5
Title 26, U. S. C. Secs. 1715a, 1716 5
Title 26, U. S. C. Sec. 1718 ..... 5, 6
Title 26, U. S. C. Sec. 3616a 5a

IN THE

Supreme Court of the United States

OCTOBER TERM—1956

UNITED STATES OF AMERICA,
Appellee,
against
JEANNE ANSELL, H. J. K. THEATRE CORPORATION, K. B. THEATRE CORPORATION, K. L. THEATRE CORPORATION, ANSELL THEATRE CORPORATION, X. K. THEATRE CORPORATION, M. A. K. THEATRE CORPORATION, T. & J. THEATRE CORPORATION, K. A. S. THEATRE CORPORATION, J. A. THEATRE CORPORATION,
Appellants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Jeanne Ansell and the corporate appellants herein pray for a writ of certiorari to review the judgment of the U. S. Court of Appeals for the Second Circuit affirming the judgments of conviction of the appellants for filing false and fraudulent returns in violation of 26 U. S. C., Sec. 1718b and 26 U. S. C., Sec. 1718a (evading the payment of admission taxes due from the corporate appellants to the United States and failing to file any tax return in one instance).

Nine indictments and one information were consolidated for trial and were consolidated for the appeal. In

each of the first eight indictments both individual defendants, Ansell and Rosenblum, and one of the several corporate defendants are charged in numerous counts with wilfully attempting to defeat and evade the payment of admission taxes due the United States during the period May 1946 through March 1949 by filing false and fraudulent admission tax returns in violation of Section 1718(b) of Title 26, United States Code.

The ninth indictment charges the defendant Ansell and the J. A. Theatre Corporation with wilfully failing to account for and pay over admission taxes due the United States, again in violation of Section 1718(b) of Title 26, United States Code; and the sole information charges these two defendants with wilfully failing to file any admission tax return in violation of Section 1718(a) of Title 26, United States Code.

Judge Leibell fined each of the theatre corporations $500 on each count in which they were named. The aggregate fine on the corporate defendants was $106,000. The individual defendants, Ansell and Rosenblum were each fined at the rate of $100 per count, making the aggregate fine $21,200 for Ansell and $210,000 for Rosenblum. Ansell was sentenced to a two year prison term on all the felony counts* and to a one year term on each of the misdemeanor counts, sentence on all counts to run concurrently. Rosenblum received an 18-month concurrent prison sentence on each count. Bail was continued by the trial judge pending appeal.

Opinions Below

The judgment of the U. S. District Court for Southern District of N. Y. was entered on a jury verdict on January 10, 1956. Hence there is no opinion in the District Court.

---

* Appellants' contention that the charges were misdemeanors only were overruled as were the motions for dismissal of the indictments.

The opinion of the Court of Appeals is dated August 20, 1956, is appended herewith and has not yet been officially reported. There is an additional opinion of the Court of Appeals denying the petition for rehearing dated October 15, 1956 which is also appended herewith and likewise has not yet been officially reported.

Pending the appeal to the Court of Appeals, appellant Ansell was released in $2,500.00 bail by the District Judge. The Court of Appeals on Nov. 7, 1956 granted a stay of the mandate pending the determination of this application for certiorari.

Jurisdiction

The j isdiction of this Court is invoked under Title 28 U. S. C., Sec. 1254 (1). The judgment of the U. S. Court of Appeals for the Second Circuit is dated and entered August 20, 1956. A petition for rehearing was denied by that Court by an order dated and entered October 15, 1956. The date of the order staying the mandate pending disposition of this petition for certiorari is dated November 7, 1956. The jurisdiction of the District Court is based on Title 26 U. S. C., Sec. 1718 (a) and Sec. 1718 (b) and Title 18 U. S. C., Sec. 3231.

Questions Presented

1. Whether there was a violation and abuse of the confidential relationship and privilege existing between Ansell and her former lawyer which gave rise in turn to a violation of her rights guaranteed by the Fifth and Sixth Amendments of the U. S. Constitution as heretofore interpreted by this Court where the Trial Court permitted Mr. Frederick Block, the lawyer who had represented both Rosenblum and Ansell during the period that the government was investigating this case and before indictment, and who represented only Rosenblum on the trial, to cross examine appellant Ansell and to sum up to the jury on

behalf of Rosenblum in the manner that he did in a situation where Rosenblum's interest and that of Ansell and the corporate appellants were diametrically opposed.

2. Whether appellants' rights pursuant to the Fourth and Fifth Amendments of the U. S. Constitution were violated when the Trial Judge denied appellant's motion to suppress evidence obtained as a result of an illegal search and seizure.

3. Whether it was error to deny appellants' motion to dismiss the indictments for failure to prove any affirmative overt acts of commission as distinguished from omission in attempting to evade or defeat the payment of admission taxes in accordance with the rule announced by this Court in *Spies* vs. *U. S.,* 317 U. S. 492 and *Berra* vs. *U. S.,* 351 U. S. 131.

4. Whether it was error to convict and sentence these appellants for felonies as distinguished from misdemeanors in accordance with the decision of this court in *Berra* vs. *U. S.,* 351 U. S. 131 and 26 U. S. C. 3616 (a) and 26 U. S. C. 3616 (b).

Constitutional Provisions and Statutes Involved

Fourth Amendment of the Constitution of the United States:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment of the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia,

when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment of the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have a compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Section 1700 of Title 26, United States Code, as effective in the years 1944 through 1949 imposed a federal admissions tax on theatre admissions at a rate of "1 cent for each 5 cents or fraction thereof of the amount paid for admission to any place."

Section 1715(a) of Title 26, United States Code provided for the collection of the admission tax by the person charging the admission:

"Every person receiving any payments for admission * * * shall collect the amount thereof from the person making such payments."

Section 1716 of Title 26, United States Code required the person collecting the tax under 1715(a) to "make returns under oath."

Section 1718 of Title 26, United States Code provides as follows:

"(a) Any person required under this chapter to pay any tax, or required by law or regulations made

under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this chapter, who wilfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * *

(d) The term 'person' as used in this section includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect to which the violation occurs. (53 Stat. 193)"

Statement and Necessary Facts

The corporate defendants were in the business of operating motion picture theatres that catered to the Spanish speaking population in New York City. For the most part the theatres were located in the areas in New York City populated by people of Puerto Rican or Spanish descent. At some of the theatres occasionally there would be Spanish speaking stage presentations.

Originally the theatre corporations were organized by investors associated with the appellant Rosenblum who was the accountant for these investors and for the various theatre corporations (R. 1291-1301).* Appellant Ansell's interest was that she received a salary for her services with a promise that she would receive stock after the advances made by the investors had been repaid (R. 1282-1301).

All of the returns which are the subjects of the indictments were concededly prepared by appellant Rosenblum, the accountant. Many but not all of the returns were signed by appellant Ansell as President. Some of the returns were signed by appellant Rosenblum (R. 1301-1304, 1308-1321, 1415-1416).

Appellant Ansell's contention on the trial was that there was no wilful fraudulent intent by her to evade or defeat the payment of any taxes due to the government. She relied on appellant Rosenblum to prepare and file the returns. She signed many of the returns in blank leaving Rosenblum to fill in the amounts. Those that she did not sign in blank, she signed without reading (R. 1415-1416). She had little schooling and no higher formal education whatsoever. Her participation in the business did not include the financing, bookkeeping or administrative part of the business. Her activity was devoted to the production and booking phase. That is the obtaining of the proper films and shows to attract the theatre patronage (R. 1278-1283, 1291-1301).

Appellant Rosenblum, the accountant, received fees for his services including accounting services, supervision of the bookkeeping department and preparation of all the tax returns. In addition it appeared that Rosenblum had a one-fourth interest in a factoring concern whose name was Burns Trading Corporation (R. 1383-1410). Burns Trading Corp. received substantial sums for financing the in-

---

* Numerals in parentheses refer to the page number of the typewritten trial record.

dicted theatre corporations so that Rosenblum received one-fourth of the profits made by Burns Trading Corp. on its factoring business with the indicted theatre corporations.

When the government agents began their tax investigation of the indicted theatre corporations Rosenblum dealt with the government agents. Ansell had nothing to do with them. Rosenblum engaged certain lawyers and accountants to assist him in connection with that investigation. During that investigation many records of the indicted corporations and some personal cancelled checks belonging to appellant Ansell were given by Rosenblum to the government agents without Ansell's knowledge or consent and in some cases the government agents took records from Rosenblum's office without Rosenblum's knowledge or consent (331-334A).

A time came in 1952 when Frederick Block, the lawyer who appeared as trial counsel for Rosenblum, was engaged and advised both appellant Rosenblum and appellant Ansell. It was on Mr. Block's advice that appellant Ansell and appellant Rosenblum both testified before the Grand Jury. Mr. Block had prepared a statement for her to read to the Grand Jury. We note the following statement by Mr. Block at R. 422:

> "And I represented to your Honor at the time that Mr. Bayliss had represented both of the defendants and had called me in and that I in turn represented both of the defendants. That is Miss Ansell and Mr. Rosenblum. I stand on that representation which I made to your Honor".

After the indictments were returned Ansell discharged Mr. Block and obtained other counsel for herself.

On the trial Ansell's contention was that the fault lay with Rosenblum; that she had nothing to do with and did not understand anything about finances or taxes and that she relied on Rosenblum completely. If she were believed then the most she was guilty of was negligence but not

wilful criminal conduct. Hence, she would be entitled to an acquittal. She testified in her own behalf (R. 1996).

On the other hand Rosenblum did not take the stand to testify. He contended through his trial counsel, Mr. Block, who formerly advised both Rosenblum and Ansell, that contrary to Ansell's attempt to picture herself as an innocent person unfamiliar with taxes and finances, she was a clever, wilful domineering executive business woman who dictated to Rosenblum what to do about the taxes and financing of the corporations; that Ansell was a person who knew what she was doing and who so dominated Rosenblum that Rosenblum foolishly but not feloniously prepared and caused the false tax returns to be filed, and in the case of the information, omitted to file any return.

Thus, the situation presented to the jury was that although false returns were filed, so far as each defendant was concerned it was the other defendant who was responsible, if indeed there was any criminal responsibility.

Appellant Ansell's Testimony

Miss Ansell's testimony appears in the record at pages 1279 through 1880 inclusive.

She testified that she was not familiar with bookkeeping and relied on Rosenblum completely (1301-1304).

She never supplied the figures or made up the returns although she was aware that the corporate defendants were obliged to pay admission taxes (R. 1307). She did not read the returns. All the returns were prepared by Rosenblum. Many of the returns are in Rosenblum's handwriting. Some of the returns are signed by Rosenblum and some by Ansell. Those that Ansell signed were either signed in blank or signed without being read by her (R. 1308-1317). At one time Rosenblum told her the returns were wrong but could be corrected by the payment of a civil penalty (R. 1317). Rosenblum had her sign the returns in blank for

convenience because she was out of town on business quite frequently (R. 1321-1330). Rosenblum and Ansell did not get along because Rosenblum did not think she possessed much business ability or acumen (R. 1335). The corporations received the benefit of all the monies that the government contends should have been paid in taxes (R. 1337-1380). The government's contention to the contrary that the money that was not paid in taxes but which should have been paid went to Ansell's personal benefit was erroneous (R. 1337-1380).

Rosenblum had a one-quarter interest in Burns Trading Corp. which was financing the theatre corporations and made a handsome profit as a result of that interest (R. 1383-1410). Before testifying before the Grand Jury Rosenblum made the arrangements for all the lawyers and accountants and she relied on him (R. 1418-1432). Mr. Block told Ansell what to say before the Grand Jury (R. 1499-1503).

Thus her testimony if believed would have resulted in her acquittal under the charge of the court because the felonious wilful intent to evade payment would not have been proved.

Of course, it follows that if Ansell were acquitted, the corporate appellants would be acquitted. Hence, the errors as to Ansell are also errors as to the corporate appellants.

The Improper Cross-Examination and Summation

When Miss Ansell had finished her direct testimony she was in a position where if the jury believed her she had an excellent chance for acquittal. However, her credibility was substantially impaired and diminished by the cross-examination and summation of Mr. Block, her former lawyer in this matter. It was in effect as if Mr. Block, her former lawyer, had himself taken the stand as a sworn witness and given factual evidence against her together with his opinion that Ansell was a liar, a cheat and a fraud

not worthy of being represented by him, an honorable member of the bar.

This will appear from much of his cross-examination and from his summation (R. 2018-2074). For instance, beginning with R. 1673 he pinned her down to stating that she reaffirmed her previous testimony to the effect that when she went before the Grand Jury she thought she was not in trouble but that Rosenblum was; that Rosenblum was the prospective defendant not she and that she was going there as a character witness for Rosenblum. He then asked her if it were not true that she did not write a letter to the Grand Jury Foreman asking for permission to appear. She said she did and identified a letter dated April 17, 1952 subsequently marked defendants' Exhibit W as the letter. Mr. Block offered it in evidence. Whereupon Ansell's trial counsel, Mr. Siegel, stated (R. 1674):

> "Your Honor I object to this and I also object to the question or any questions by Mr. Block of this witness on the ground that at the time he was acting as counsel for her.
>
> Mr. Block: * * * I think that there is absolutely no question whatsoever about any confidential relationship. All of these are matters, I can assure your Honor, that have come to me from other sources than from communications by——
>
> The Court: Did you dictated that letter for her, the letter that you just showed her?
>
> Mr. Block: Possibly I did.
>
> The Court: There is a question as to whether or not you should cross-examine her on matters that you acquired a knowledge of as a result of the fact that you acted as her attorney and also as the attorney for Mr. Rosenblum at one and the same time. That is something for you to resolve yourself".

As we shall show presently, while it may be that counsel should also resolve that matter for himself, nevertheless, the duty is cast upon the court to sustain the objection and protect the accused notwithstanding how counsel may re-

solve the matter. That duty cannot be delegated by the court to counsel, especially in the Federal Court where the trial judge is the governor of the trial and not a mere moderator as in a state court.

The colloquy continued on R. 1675-1676 after the Court had ordered the document to be marked Defendants' Exhibit W in evidence as follows:

> "The Court: Madam, was it your suggestion that you seek permission to go before the Grand Jury?
>
> The Witness: No your Honor it was not. It was Mr. Block's idea that we go before the Grand Jury and get permission to do so because there was nothing to hide.
>
> The Court: All right, go ahead.
>
> Mr. Siegel (Ansell's counsel): All of this, your Honor, is objected to.
>
> The Court: Yes, you mean including the court's question?
>
> Mr. Siegel: No it is not that. It is no reflection upon your Honor, but any interrogation pertaining to the time Mr. Block was acting as her attorney, we object to. * * *
>
> Mr. Siegel: I say he (Block) is precluded from it and he is disqualified, and if it continues, I ask your Honor to withdraw a juror and declare a mistrial on the ground that——
>
> The Court: Jurors, you are excused. You go out to the jury room." (R. 1676).

Then the court told Mr. Siegel to make his argument; whereupon he moved for the withdrawal of a juror and a mistrial on the ground,

> "that this defendant is being examined on matters confidential between the attorney and herself in the course of an attorney-client relationship and matters within their own personal knowledge; that the defendant, who alone has the knowledge, is now being asked to answer questions on cross-examination

> peculiar to the knowledge of the attorney and herself prior to her appearance before the Grand Jury." (R. 1677)

The Court then stated that he would limit Mr. Block in his examination of the witness to any statements she made before the Grand Jury since Mr. Mahoney, the government prosecutor, had likewise examined her with respect to certain statements she made before the Grand Jury (R. 1677-1678).

The Court then had the jury brought back and at page R. 1688 stated as follows:

> "The Court: Now, your motion for a mistrial is denied, and your motion, Mr. Block, I have ruled upon and I will tell the jury the extent of the ruling."
>
> In view of the fact that the witness, Miss Ansell, was questioned by the government concerning any statement she made to the Grand Jury in which she said in effect * * * Mr. Block may inquire".

Later Mr. Block read defendants' Exhibit W to the jury over Mr. Siegel's objection (R. 1690). Then Mr. Block began to question her about her appearance before the Grand Jury, all over the objection of Ansell's counsel, Mr. Siegel (R. 1691-1692-1693), and on other confidential matters (R. 1693-1698). Mr. Block continued his hostile improper cross-examination (R. 1857 through 1885). Later, on the re-cross-examination of the government agent witness Flannery, Mr. Block made the following comment (R. 1928):

> "Mr. Block: Your Honor, I have no objection to the check except that I am not conceding the truth of the defendant Ansell's testimony with respect to it".

And at R. 1939 even Judge Leibell addressing Mr. Block noted:

> "The Court: What about you? Haven't you in your cross-examination and the like taken an attitude that was hostile to Miss Ansell?"

At R. 1996 the Judge stated that he intended to charge as follows:

> "If the jury finds that the defendant, Jeanne Ansell, in good faith relied upon her accountant to prepare the figures in the various corporate admissions tax forms or returns admitted in evidence in this case and if she did not know they were false when she signed them, then, even though she was grossly negligent in her conduct and might even be subject to civil liability therefor, the defendant, Jeanne Ansell, must be acquitted."

Mr. Block took exception to that and stated (R. 1997):

> "Mr. Block: Yes, your Honor, and I submit that that is wholly incredible in the light of her entire testimony.
>
> The Court: But whether or not it is credible, isn't that for the Jury?

Continuing on R. 1998:

> Mr. Block: No, your Honor, I submit that it is so patently incredible that your Honor——
>
> The Court: I can't say that, counsel, about a witness. I have to leave the credibility of each witness to the jury.
>
> Mr. Block: Well, your Honor, I respectfully disagree."

Mr. Block summed up. His summation appears at (R. 2018-2074). It should be read in its entirety. However, we present herewith a few excerpts which will suffice to illustrate the point we are making. After stating at R. 2022 that he, Mr. Block, was going to talk about Miss Ansell's testimony which, "to summarize it very briefly, attempted to put the entire blame for this on the shoulders of my client", he stated at R. 2023:

> "All I am interested in doing, ladies and gentlemen, is discussing with you those things which in my judgment indicate that Miss Ansell lied and lied and lied

when she tried to walk away on this witness stand from the entire situation * * *".

"Jeanne Ansell, I am sure, never signed a document which said in so many words, 'I am a cold, calulating, driving business woman, who will brook no interference with my affairs, and I run everything the way I want to run it'. It is not as simple as that, but in this case she came very, very close". (R. 2023-2024)

* * *

"I say that it is little things like this that enable you ladies and gentlemen to pierce the smoke-screen, and when you hear words like 'an uneducated babe in the woods' you can assign those words their true meaning and come to the conclusion that they have no validity in their application to the defendant Ansell in this case". (R. 2028)

Then Mr. Block went on to comment that his client Rosenblum did not take the stand whereas she, Ansell, did, that Rosenblum did not take the stand because, Mr. Block stated, the explanations that Rosenblum would have made had he taken the stand, were made for him by others (R. 2031).

Then follow these words:

"* * * his defense came out through the testimony of Jeanne Ansell before the Grand Jury which she repudiated here but which nevertheless you can consider, because she admitted that when she went before the Grand Jury she had said those things". (R. 2032)

* * *

"This woman, who did not have to ask anybody's leave to do anything, although she would have you believe the contrary, she is the one who gives the orders and draws the checks and those special accounts for other purposes than taxes right at the very beginning and right on through". (R. 2036)

* * *

"So that Ansell herself was torn between whether she was going to pay this money to the Government

or whether she was going to satisfy her insatiable urge to be a motion picture theatre magnate". (R. 2039)

• • •

"I wish you would study it, (referring to government's Exhibit 27), and you would see whether I am not correct in telling you ladies and gentlemen that she wanted to be a motion picture theatre magnate, as she goes on expanding her operations all the time. She is not doing very well all the time; she is doing it with borrowed money. My adversaries will tell you she was in the hands of the money lenders. She wasn't in the hands of the money lenders. She was making shrewd deals to pick up theatres and expand what she liked to think was her empire". (R. 2041, 2042)

• • •

"You remember I asked Miss Ansell, and I submit that she didn't answer truthfully * * *". (R. 2043)

• • •

"I think ladies and gentlemen, that I have reached the point where I can say something to you about this tendency on the part of Miss Ansell to throw dirt on everyone who crosses her path and who stands in her way". (R. 2046)

• • •

"She (referring to Ansell) didn't care about how that charge against me made me look as a lawyer, putting a client before a grand jury with me knowing that the client could be indicted, but suggesting that the client go in before the grand jury on what amounts to a pretext or a ruse. That is the charge that this woman saw fit to make against me, and I say that if she could say that about me—and it is false, as you well know it is false—and as these documents show, then she could say anything about anybody, including all these charges that she has made about Irving Rosenblum". (R. 2047)

• • •

"Then, of course, you recall this last business, and I leave this to you, whether you believe Miss Ansell when she denied that she had insisted * * *". (R. 2048)

• • •

"Is she, do you think, a weak sister, a babe in the woods with that kind of effrontery? I don't think so". (R. 2050)

• • •

"There again we come back to Rosenblum's dilemma. What was he going to do with this woman?" (R. 2051)

• • •

"Further bearing on the kind of woman that Miss Ansell is, you have got this receipt which Tanchain signed for those stock certificates in 1946. It gives a direct lie to Miss Ansell that she never saw any stock certificates at all". (R. 2067)

Mr. Block then goes on to criticize the government prosecutor for his handling of the case.

"Wasn't it his obligation as a government prosecutor to go in there and thoroughly expose Ansell? Was it my job? It was my job to expose her on the things I had but the grand jury minutes are secret documents and defendants only have limited rights in them, but they are not restricted, as far as Mr. Mahoney is concerned". (R. 2070)

These excerpts present a fair picture of the summation of Mr. Block with reference to Miss Ansell. Surely it cannot be gainsaid that it must have been grossly damaging. The jury knew that Mr. Block had previously represented Ansell. They were now confronted with a lawyer who was castigating her in no uncertain terms, who bluntly characterized her as a liar and as one who should not be believed and who staked his professional reputation and professional competence against her. We submit that so far as Miss Ansell was concerned Mr. Block was more damaging than the government prosecutor. We do not need to labor that point because Mr. Block himself criticized the government prosecutor for not exposing Miss Ansell but instead putting the burden on him, Block, to expose her.

Thus we have a former lawyer of a client not only trying to factually contradict her but in addition heaping insult

upon injury by giving the jury his opinion of Miss Ansell, something which he could not do if he were sworn as a witness. In effect, therefore, we have Mr. Block giving factual and opinion evidence adverse to his former client without having to do what any other witness would have to do, namely, take an oath and face cross-examination.

Had Mr. Block been compelled to submit to cross-examination he would have been confronted with a letter that he had written to the attorney who had recommended him to the client wherein he stated to that attorney that he thought Miss Ansell was innocent and could not understand why he no longer was being continued as her counsel. That letter was marked Defendants' Exhibit L and L1 for identification of Ansell's motion for a new trial.

The damage that this must have done to Ansell stands out in bold relief when it is contrasted with what the prosecutor had to say. We quote from the prosecutor's summation:

> "Now with respect to the defendant Rosenblum, Miss Ansell would have you believe that he was the evil genius in this crime. Although the government has nothing to say about the full sweep of her blame-shifting accusation, yet you might consider that there would be some basic truth underlying this attack on Goldberg and Rosenblum. (Goldberg was a lawyer who Rosenblum brought in before Block). That is for you to consider. Certainly you might well feel that because of his broader business experience, his age and his knowledge about tax matters, that it was he who had the greater moral responsibility. These things are for you to determine". (R. 2137-2138)
>
> "* * * the most important fact in connection with that doctrine is the fact that Rosenblum personally prepared each one of these false returns. He prepared the returns knowing that they were false, knowing that the government was getting one half of the money that was due. This wasn't some peripheral act. This was essential; it was indispensable to the successful operation of the scheme to defraud. Of

course he would explain this by saying again as in his conversation with Lillenstein that he received this figure from Ansell. Now he said it but you don't have to believe it". (R. 2138-2139)

On the motion for a new trial (denied at R. 2314) there was marked for identification defendants' Exhibit L and L1 from which it appears that Mr. Block in writing stated that he thought Miss Ansell was innocent. The Court refused to receive this in evidence on the motion because it had not been offered on the trial. Nevertheless, it confirms the error in permitting Mr. Block to cross-examine and sum up in the manner that he did.

In permitting Miss Ansell's former counsel Block to cross examine her and to sum up in the manner that he did Miss Ansell was deprived of the right to have the confidential relationship that had existed between Block and herself kept inviolate and was deprived of her rights under the Fifth and Sixth Amendments as interpreted by this Court as we shall demonstrate hereafter under the heading "Argument".

The Illegal Search and Seizure

The following facts are relevant in connection with the contention that substantial and material portions of the evidence adduced by the government were obtained as a result of an illegal search and seizure in violation of appellant's rights under the Fourth and Fifth Amendments of the Constitution.

The government agent Bonitz testified that he came into the case when special agent Flannery was in charge (R. 81), and that the tally sheets of the theatres came into his possession while he was working at the offices of the indicted theatre corporations in June 1949 (R. 82-84). The tally sheets were sheets that contained a daily record of the paid admissions to the theatres. On the basis of those sheets

the government was able to reconstruct the amount of tax due it. He worked in these offices for a period of one and one-half months (R. 84-92), and also at Mr. Rosenblum's office (R. 89-90). These sheets were given to him by a girl who worked in the office whose name was Mary (R. 114). He was referring to government's Exhibit 11 which was the basis for the compilation of the schedules offered in evidence by the government to show the tax defalcations.

It appears from the testimony of the government agent Jankowitz, who was a special agent at the time of the investigation in 1949, and who worked under the supervision of special agent Flannery, that he never met Ansell until 1951, that is after the investigation. He saw the records at Mr. Rosenblum's office in 1950. The records that he saw consisted of the cash receipts books of the various corporations, the cash disbursements books, the special cash books, cashier's daily tally sheets, notes payable ledgers, purchase books, cancelled checks, bank statements, invoices, accountants' work papers, payroll records and also Miss Ansell's personal cancelled checks (R. 248-250). Jankowitz was one of the main witnesses for the government.

He testified that he took most of the records from Rosenblum's office and turned them over to special agent Flannery in the Government office and later returned most of them but not all of them. He retained many of the cancelled checks of the corporations which were subsequently marked government's Exhibit 24 (R. 259-260). He took government Exhibit 24 from Rosenblum's office during the period of January to June 1950. The records that he took and returned, he only returned after he made a complete analysis of them (R. 261-262). That he was one of the main government witnesses appears from the fact that his testimony commenced at page 243 and goes through to page 397 without interruption and commences again at page 688 and ends at page 747.

He admitted at R. 331 through 334A that while he was examining all of the records referred to above in Rosenblum's office he specifically requested to see, (332)

> "the payroll records, certain contracts, Miss Ansell's personal checks and some other records, which I don't recall off hand but there was occasion for me to request additional records.
>
> Q. You made your request of Mr. Rosenblum, did you not?
> A. That is true.
>
> Q. Did you make any request of Miss Ansell to furnish these records?
> A. No, I did not.
>
> Q. At any time?
> A. No, I did not see Miss Ansell".

He testified further that they were not in Rosenblum's office but in the theatre corporation offices; that the records were brought from the theatre offices to Rosenblum's office, and then appears the following (R. 333):

> "Q. Were all of the records that you requested produced?
> A. No not all. I had requested all of Miss Ansell's personal checks and only a portion of her personal checks were submitted to me.
>
> Q. Did you speak to Miss Ansell about it?
> A. I never spoke to Miss Ansell until a conference which was held in the office of the Intelligence Unit in March of 1951". (R. 333)

And then appears the following at R. 334-334A:

> "Q. During the period of your investigation at Rosenblum's office, did Miss Ansell ever come to that office?
> A. I didn't see her at the office, at Rosenblum's office.
>
> Q. In the times you were there, you never saw her?
> A. I didn't see her.

> Q. So that during this period of time, when you were working in Irving Rosenblum's office, your discussion was had primarily with him, is that correct?
> A. Yes sir".

At R. 339 and 340 he testified that he examined the endorsements appearing on all of the checks contained in Government's Exhibit 24 and that he traced most of them into her personal account. He further stated at R. 340 that he secured a copy of Miss Ansell's personal accounts and that he requested all of her personal checks but that he was furnished only with a portion of her personal checks.

The importance of this to the government was that the government contended that it showed the fraudulent intent on the part of Miss Ansell; that she had diverted monies from the corporation to herself for her own personal benefit instead of using these monies to pay the taxes due the government. He repeated on cross-examination the foregoing at pages 377 through 388.

He was asked whether he got permission to take these records and replied, "The records were supplied to me for my examination" (R. 378). When asked whether Rosenblum knew he was taking the records he answered, "I don't recall anything specific as to what he said but I mentioned it to him that I was taking some of the records" (R. 378). He kept some of the records and returned others including Miss Ansell's personal checks to Rosenblum (R. 379). He made a schedule of the checks (R. 379-380). He took the records for the purpose of discussing them with special agent Flannery and for making extracts and for preserving the original records that they thought were important. He stated that while he couldn't recall any particular conversation wherein he told Rosenblum what he was doing; nevertheless, he was under the impression that Rosenblum knew (R. 381-382). At any rate according to Jankowitz, Rosenblum did not object to it. All he could recall was that he merely told Rosenblum that he was taking the records (R. 383). He admitted further at page 388 that when he (Jankowitz) was at Rosenblum's office from time to time he

would take original papers out to have photostated and then return them and that included Rosenblum's work papers and Miss Ansell's cancelled checks and that he couldn't recall whether he ever discussed that he was photostating originals with Rosenblum. He stated: "A. I don't believe I mentioned anything about photostating" (R. 388). He admitted the property belonged to the taxpayers (R. 389). At R. 407-408 the government prosecutor admitted that the Intelligence Section preserved certain records consisting of the "checks that indicated personal expenditures or unexplained cash items or cash deposited to Miss Ansell's personal account or other investments" (R. 407). Since this came to the knowledge of trial counsel for Miss Ansell for the first time on the trial he orally made a motion to suppress the evidence pursuant to the Fourth and Fifth Amendments of the Constitution, the Court stating that he would entertain the motion (R. 417-418).

And then at pages 435 through 439 definite arrangements were made between the court and counsel for all sides for the hearing of the motion to suppress on the merits, the Court holding it was timely made under all the circumstances.

It appears from the testimony of the witness Mrs. Schwartz (aso referred to as Miss Tanchain), who was formerly employed by the theatre corporations and in charge of the office of the theatre corporations (called as a government witness), that the "Mary" referred to by the government agents as the person who gave them the books and records was a teen age girl who at first worked part time after school and then full time when she finished school. Her name was Mary Ramirez (R. 498-502).

The government agent, Jankowitz resumed his testimony at R. 688. His testimony extends from R. 688 through R. 747 inclusive. It appears that the checks that he took from Rosenblum's office were listed in a schedule prepared by him which was marked Defendants' Exhibit D

(R. 694-695). The personal checks of Miss Ansell taken by him were returned by him to Rosenblum.

Then the government put government agent Flannery on the stand and through him introduced various schedules one of which was Government Exhibit 32 prepared as a result of the information obtained from the corporate records and Ansell's personal checks on the basis of which this witness made the statement that Ansell drew out over $300,000 from the corporations and put back $167,000 and some odd dollars concluding that the difference was drawn for her own personal benefit, during a 5 year period extending from 1944 through 1949 (R. 902-910).

Exhibit 32 was summarized by the court at R. 1120 as follows:

> "It concerns principally the defendant Ansell according to the testimony of Mr. Flannery, the receipt by her of certain sums of money totaling $360,000 and the expenditure by her or the repayment by her of a sum of around $167,000, leaving $191,500 in round figures that, according to the government, as set forth on this Exhibit 32 for identification, was not returned to the corporation and not expended in their behalf according to the records of the corporation. So Exhibit 32 is received in evidence".

On this basis the government contended that here was proof of Ansell's fraudulent intent. Hence, if this evidence were obtained in violation of appellants' constitutional rights, the error was substantial and dictates a reversal of the conviction.

It appeared also that Flannery was exchanging information with another government agent, Geller, who also examined Miss Ansell's personal income tax returns (R. 936-941). Flannery was definite that Rosenblum gave him Miss Ansell's checks (R. 941 through 942a) while Flannery was working and cooperating with agent Geller.

The motion to suppress appears in the record at R. 981 through 1061. It was made on the basis of the evidence

already in the record hereinbefore alluded to plus the testimony of Miss Ansell who took the witness stand at that point for the purpose of the motion. Her testimony begins at R. 1022 and extends through R. 1045. She testified at R. 1023 that she at no time authorized Rosenblum to turn over any papers to Jankowitz or any other special agents of the Treasury Department; that she never knew that Geller, the Internal Revenue Agent who was checking her personal income tax returns, was giving any information to the other agents. She never consented to the taking of the papers from Rosenblum's office, that is the papers referred to in Exhibit D and those that were taken by the agents to the office, photostated and returned and those withheld (R. 1022-1025). The Court denied the motion (R. 1061).

Flannery continued to testify and at R. 1074, Exhibit D being a list of checks taken from Rosenblum's office was marked in evidence over Ansell's objection. They retained the checks until they wrote up their report (Defendants' Exhibit E) (R. 1077-1079). They had the papers in their possession from the summer of 1950 until October 1951 (R. 1079). Ansell's counsel's motion to strike out the testimony was again denied (R. 1079). Then all of the government exhibits which had been marked for identification pending a determination of the motion to suppress were offered in evidence (R. 1083-1087) and admitted over the objection of counsel for Ansell.

At pages 1156 through 1161 appear the motions to dismiss the indictment and for a directed verdict for acquittal on behalf of the corporate defendants and the defendant Ansell which were all denied. While the jury was deliberating they asked for the following exhibits (R. 2241 through 2246):

> Government Exhibits 1 through 8, being tax returns;
>
> Government Exhibits 12 through 21, being the schedules prepared by the government agents;

Government Exhibit 11, being a specimen daily tally sheet of the theatres;

Government Exhibits 23 and 35, being bank statements on special theatre accounts;

Government Exhibit 24, being the cancelled checks received against the defendant Ansell.

After that was sent to the jury they next asked the court to read to them the entire testimony of the government agent Lillenstein with regard to the interview with Ansell (R. 2247 through 2249). Shortly after that was done they returned with their verdict of guilty.

Reasons for Granting the Writ

1. In overruling appellants' contention that the Trial Judge did not err in failing to limit Ansell's cross examination by her former attorney Block and in failing to limit Block's summation to the jury, the Court of Appeals refused to give effect to the decisions of this Court and decided the case in a way in conflict with the applicable decisions of this Court and the Fifth and Sixth Amendments of the Constitution.

2. In overruling the contention of appellants that there was an illegal search and seizure in violation of their rights under the Fourth and Fifth Amendments, the Court of Appeals decided the case in a way in conflict with the applicable decisions of this Court and the Fourth and Fifth Amendments of the Constitution.

3. In failing to dismiss the indictments for insufficiency because of the Government's failure to prove an overt act of comission as distinguished from omission and sentencing these appellants under the felony statute rather than the misdemeanor statute, the Court of Appeals ignored the rules announced by this Court in *Spies* v. *U. S.*, 317 U. S. 492 and *Berra* v. *U. S.*, 351 U. S. 131. The decision

of the Court of Appeals is also squarely in conflict with the decision of the Fifth Circuit in *Clay* v. *U. S.*, 218 Fed. 2nd, 483 which applied the rule of the *Spies* case.

4. The Court of Appeals opinion indicates that the opinions of this Court in *Spies* v. *U. S.*, 317 U. S. 492 and *Berra* v. *U. S.*, 351 U. S. 131 require clarification. These are of great significance to the government and taxpayers in an important field of Federal Law. Only this Court may authoritatively and finally supply this needed clarification.

Argument

FIRST: It is clear that, contrary to the provisions of the Sixth Amendment of the Federal Constitution, Miss Ansell was denied the right to be confronted with Mr. Block qua witness and that instead of receiving his assistance, the prosecutor received it. It is also clear that the common law, privilege and confidential relationship that exists between lawyer and client was violated and that the combination of these errors is a denial of due process guaranteed by the Fifth Amendment.

The authorities uniformly condemn the invasion and spoliation of the common law privilege existing between lawyer and client such as is involved in the case at bar. It is condemned both on common law grounds and on constitutional grounds. Please see the following cases where these principles were applied in comparable factual situations.

Glasser v. *U. S.*, 315 U. S. 60;
Von Moltke v. *Gillies*, 332 U. S. 708;
People v. *Gerold*, 265 Ill. 448, 107 N. E. 165 (1914);
People v. *Abair*, 102 Cal. Appl. 2nd 765, 228 Pac. 2nd 336 (1951);
State v. *Archuletta*, 29 New Mex. 25, 217 Pac. 619 (1923).

It makes no difference that Mr. Block also represented Rosenblum at the time that he represented Ansell. The rule is that when two or more persons interested in a problem consult a lawyer the privilege attaches in a controversy of either or both with a third party. Here the controversy is between Rosenblum and Ansell on the one hand and the government on the other hand as the third party.

> *Root* v. *Wright*, 84 N. Y. 72, 76;
> *State* v. *Archuletta*, 29 New Mex. 25, 217 Pac. 619 (1923).

And see also in this connection the majority and dissenting opinions in *People* v. *Fernandez*, 301 N. Y. 302.

Nor can it be said that Ansell waived her rights by not moving to disqualify Mr. Block prior to the commencement of the trial (*Glasser* v. *U. S.*, 315 U. S. 60). She could not know what turn the trial would take, what his strategy would be, or what his cross-examination and summation would be. This is so, notwithstanding that it might have appeared at the beginning of the trial that there was no necessity to disqualify Mr. Block. However, when it began to appear what Mr. Block's tactics were going to be and certainly no later than the point at which Miss Ansell's trial counsel objected to Mr. Block's cross-examination, the court should have taken steps to prevent completely the hostile cross-examination and summation.

It was stated by the Court in *People* v. *Fisher*, 249 N. Y. 419, 424:

> "The decision of the Trial Court rendered before the trial is dictated by reasonable anticipation based on the facts then disclosed. The decision of the Appellate Court rendered upon a review of the trial itself rests upon the determination of whether the prophecy has been realized".

And at page 427:

> "Prospection by the Trial Judge is not final. A retrospective view by an Appellate Court may reveal injustice or impairment of substantial rights unseen at the beginning".

In this case there certainly was an impairment of substantial rights of Ansell that were not foretold at the beginning of the trial. No doctrine of waiver prevents this court from righting this injustice and subversion of basic rights.

> *Glasser* v. *U. S.*, 315 U. S. 60;
> *People* v. *Fernandez*, 301 N. Y. 302, 336-343;
> *Smith* v. *U. S.*, 337 U. S. 137, 149-150.

Lastly, we submit that the summation of Mr. Block was in effect testimony given by him against Ansell. She was deprived of the right of confrontation and cross-examination and of the right to object to his derogatory opinions of her announced by him. The error is substantial and cannot be glossed over.

The Court of Appeals assumed the correctness of Ansell's argument that the confidential relationship between Block and herself existed at the time of the trial and had to be respected. However, the Court found no impropriety. It stated that the cross examination was based on non privileged materials. But the point is that if the use of confidential information leads to the obtaining and utilizing of non-privileged materials the constitutional rights have been violated. This rule is analogous to the exclusion of lawfully obtained evidence secured as a result of a lead furnished by tainted illegal evidence. Block could have only known about much of the materials that he used, such as a letter written to the Grand Jury and subpoenaed court records, from what he learned while he had been acting as Ansell's counsel. So considered, the cross-examination was improper.

The Court of Appeals in effect concedes the great damage done to Ansell by her erstwhile defender Block who on the trial became her zealous prosecutor himself stating that he outprosecuted the government prosecutor (R. 2070).

The Court justified Block's damaging summation on what seems to be a dual theory of provocation or waiver. That is to say the Court stated it was first brought out on her direct examination that Block had previously represented her. But this was brought out as a legitimate part of her defense to explain the reason why she had made certain admissions which appeared to be damaging at a time when Block was representing her. As for Block defending his own character and integrity the short answer to that is that he was not on trial for anything.

The teaching of this Court in *Glasser* v. *U. S.*, 315 U. S. 60 and *Von Moltke* v. *Gillies*, 332 U. S. 708 is that the invasion of rights guaranteed by the Fifth and Sixth Amendments are not to be condoned on any theory of provocation or waiver. For these reasons we respectfully submit the Court of Appeals is in error on that phase of the case.

SECOND: The Fourth Amendment of the Federal Constitution prohibits unreasonable searches and seizures. The Fifth Amendment declares that no person shall be compelled to incriminate himself. In most cases there is an interplay of both the Fourth and Fifth Amendments to shield a defendant. The reason is that if the evidence is illegally obtained the use of it is a compulsory incrimination. *Boyd* v. *U. S.*, 116 U. S. 616.

It appears that the court was under the impression that the corporate defendants could not raise the question of illegal search and seizure. That is not unqualifiedly so.

In *Silverthorne Lumber Co.* v. *U. S.*, 251 U. S. 385, the Supreme Court explicitly held that a corporation may in-

voke the Fourth Amendment against illegal searches and seizures but that it may not invoke the Fifth Amendment. Only a natural person may invoke the Fifth Amendment.

Hence, we start with the proposition in this case that the seizure of the corporation records from Rosenblum's office was illegal.

In *Gouled* v. *U. S.*, 255 U. S. 298 it was held that the secret abstraction of a paper from a file by a government agent violates the Fourth Amendment and by implication holds that the turning over of a paper to the government by a person not authorized to do so is also an illegal seizure. Hence in this case insofar as Ansell is concerned, Rosenblum had no authority to turn over any papers to the government, and hence, so far as the corporate records were concerned, it was an illegal seizure in violation of the Fourth Amendment. As far as her own personal checks were concerned, Rosenblum certainly had no authority to give them to the government agents. That would clearly constitute a violation of both the Fourth and Fifth Amendments.

In *Zap* v. *U. S.*, 328 U. S. 624, relied upon by the prosecutor in Court below, an employee of a contractor making Navy equipment gave a check to the F. B. I. It was held that although the F. B. I. had a right to inspect the books of the contractor because of a provision for that in the contract between the Navy and the contractor, still the employee had no right to give the check to the F. B. I. The Court held the search legal but the seizure illegal. The conviction was sustained only on the theory that in that case the error in admitting the evidence was harmless. In this case the error certainly was substantial.

To have an illegal search and seizure there does not necessarily have to be a trespass. Fraud in obtaining the material is the same as a trespass. *Zap* v. *U. S.*, 328 U. S. 624, 629; *Gouled* v. *U. S.*, 255 U. S. 298.

Mere acquiescence in a search by law officers without the clear consent of the defendant or even the defendant's submission to the search without a clear consent is not a waiver of the Fourth Amendment.

Zap v. *U. S.*, 328 U. S. 624;
U. S. v. *Sully*, 56 Fed. Sup. 942;
U. S. v. *Linderman*, 32 Fed. Sup. 123.

The assignment of a Revenue Agent to obtain, without the defendant's knowledge and consent, extensive information and extracts from taxpayers' books and records far in excess of those required for customary routine audits of a Revenue Agent cannot be distinguished from obtaining the information by stealth or subterfuge in violation of the defendant's rights. *U. S.* v. *Lipschitz*, 132 Fed. Sup. 519, 523. In this case so far as Ansell was concerned that was certainly done.

When the Government relies upon the consent of an alleged agent for the turning over of defendant's records the burden is on the government to prove his authority to do that. In *Rezutek* v. *U. S.*, 147 Fed. 2nd 142, the court noted that the extent of an agent's legal authority to consent to a search and seizure may often be a matter of grave dispute. It is clear in this case that Rosenblum, whose interest is diametrically opposed to Ansell, never had that authority, express, implied or apparent.

We also note that the records consisted of Miss Ansell's personal checks and the corporate records of the theatre corporations. We realize that it has been said that stockholders of a corporation cannot obtain immunity if corporate records are seized, that the immunity is to the corporation and not to the stockholders who are considered separate and distinct from the corporation. *Lagow* v. *U. S.*, 159 Fed. 2nd 245. Nevertheless, we also note that there are limitations even on this doctrine. It has been held in *U. S.* v. *Daisart Sportswear, Inc.*, 169 Fed. 2nd 856, reversed sub

nom *Smith* v. *U. S.*, 337 U. S. 137, that compelled oral testimony beyond identifying the records of a corporation is privileged if it would incriminate the witness. A waiver of constitutional rights is not lightly to be inferred. *Smith* v. *U. S.*, 337 U. S. 137, 149-150.

If the Government should contend that there is substantial untainted evidence in the record to convict without the tainted, we answer that the burden is on the government to untangle the untainted from the tainted and that that cannot be done in this case. It must be remembered that we are dealing now with constitutional rights.

Nardone v. *U. S.*, 308 U. S. 338;
U. S. v. *Goldstein*, 120 Fed. 2nd 485, aff'd. 316 U. S. 114;
U. S. v. *Coplon*, 185 Fed. 2nd 629;
U. S. v. *Lipschitz*, 132 Fed. Sup. 519.

The Court of Appeals assumed arguendo that Ansell's personal records were illegally obtained but stated that as to her it was harmless error because the use of her checks as evidence tended to establish that she had spent personal funds for corporate purposes thereby reimbursing the corporation for funds withdrawn by her.

The point is that the government claimed on the trial that Ansell used the major part of the money for her own personal use and confronted her with documents such as invoices from department stores for personal items. (Government's Exhibit 32 summarized by the Trial Court at R. 1120.) The government claimed that whereas she had diverted about $360,000. from the corporations, after crediting her with corporate expenditures she still failed to account for $191,000. To the extent that her personal checks failed to account for $191,000, Government's Exhibit 32 which was based on the illegally seized checks harmed her.

THIRD: The indictments failed to allege and the government failed to prove on the trial affirmative overt acts of commission in attempting to evade or defeat the payment of the tax. It merely proved that false returns were filed. The mere filing of false returns without allegation or proof of an affirmative overt act of comission as distinguished from omission is a misdemeanor and not a felony. Since the indictments alleged felonies and not misdemeanors, the judgments of conviction on the indictments should have been reversed and the indictments dismissed.

In *Spies* v. *U. S.*, 317 U. S. 492 the Supreme Court made it clear that there is a distinction so far as the penalty and the degree of the crime is concerned between a wilful omission to make a return or a wilful filing of a false return and a wilful attempt to evade or defeat the payment of a tax. The omission to make a return and pay the tax or the filing of a false return is a misdemeanor while the greater offense of omitting to make a return and pay a tax or making a false return, with intent to evade or defeat the payment of a tax is a felony. The Supreme Court stated there must be some affirmative overt act of comission as distinguished from omission, to constitute the higher degree of the crime. There must be conduct the likely effect of which would be to mislead or conceal. Thus in the *Spies* case the conviction which was a felony conviction was reversed and the matter sent back for a new trial.

The Court of Appeals stated that the *Spies* case is distinguishable from this case because there was evidence from which the jury could find not only "the wilful and knowing filing of false returns but also that both Rosenblum and Ansell had concealed the existence of the monthly summaries of the admission taxes from the government". We submit that such reasoning is erroneous because the overt act required by the *Spies* case must be an act connected with the corpus of the particular crime charged in each count. The other returns each of which was the

subject of a distinct count in the indictments may not fairly be said to be that kind of proof.

The evidence does not support the statement that Ansell concealed the existence of monthly summaries. What happened was that in her conversation with the government agent she was not directly asked about whether there were such summaries in existence. She did not volunteer the information. There was no duty on her part to do so.

In any event since this conversation took place long after the returns were filed it is not the type of overt act referred to in the *Spies* case. As we read the *Spies* case the overt act must be an act that occurs prior to the completion of the crime and not after. Here the crime was complete upon the filing of the return. If there was any fraud committed it was committed on the day that the return was filed and not thereafter. Hence, we submit that the proof on behalf of the government failed to fall within the rules laid down in the *Spies* case and the indictments should have been dismissed.

Had the Court of Appeals followed the Fifth Circuit decision in *Clay* vs. *U. S.* 218 Fed. 2nd 483 which decision was based on the *Spies* case the convictions would have been reversed. As matters stand now there is a conflict between the Second Circuit and the Fifth Circuit.

In *Clay* v. *U. S.*, 218 Fed. 2nd 483, 5 Cir. (1955) the indictment charged a wilful failure to pay the tax and thus evade the tax, a felony. The defendant was convicted. The Court of Appeals reversed and dismissed the indictment holding that the indictment was insufficient in that it did not charge an affirmative act of commission as distinguished from omission within the rule laid down in the *Spies* case. The conviction was reversed and the indictment dismissed notwithstanding that on the trial there was proof from which an affirmative act of commission could be inferred. This case is authority for the proposition that an invalid indictment may not be sustained notwithstand-

ing that the proof on the trial goes beyond the indictment and may be sufficient to prove the crime attempted to be alleged in the indictment had the indictment been properly framed to begin with. How much more so should an indictment be dismissed when the proof on the trial does not go beyond an indictment that does not itself suffice?

In the case at bar the indictments fail to allege any affirmative overt acts of commission in attempting to evade or defeat the payment of the taxes. Nor does the proof that was submitted on the trial go beyond the indictment and show any such affirmative acts. Therefore, on the authority of the *Spies* case and the *Clay* case the judgments on the indictments should be reversed and the indictments should be dismissed. Compare also *Berra* v. *U. S.*, 351 U. S. 131. If the indictments are dismissed for this reason there should be a new trial with respect to the conviction on the information because certainly the evidence submitted by the Government in support of the indictments while insufficient as we have noted above, must have been extremely prejudicial and influenced the jury with respect to their verdict on the information.

FOURTH: Assuming the guilt of these appellants they should have been sentenced under the Misdemeanor Statute U. S. C. Title 26 Sec. 3616a, notwithstanding that each of the indictments cites Section 1718b of Title 26, a felony. Our authority for this contention is *Berra* v. *U. S.*, 351 U. S. 131. We also repeat that when the *Berra* case is read in conjunction with the *Spies* case the dismissal of the indictments is required. The Court of Appeals rejected this contention for reasons stated by another panel of the Court of Appeals in *U. S.* vs. *Moran*, 236 Fed. 2nd 361 decided by that other panel of the Court approximately 2 weeks before the case at bar.

Judge Frank who wrote the opinion in this case makes the astonishing statement that he "has some doubt about that reasoning". (Referring to the reasoning in *U. S.*

vs. *Moran*). He goes on to say that there is language in the *Berra* case which supports the position of the appellants, and states "on that interpretation, we should, in the instant case, remand for resentencing under the misdemeanor statute. However, the writer is not sure enough about the above interpretation of Berra to justify his dissenting here." Thus, we have a highly respected judge stating unequivocally that there is doubt as to the precise meaning and limitations of the *Berra* case. *U. S.* vs. *Moran* rejected the rationale of the dissenting opinion in the *Berra* case and is diametrically opposed to Mr. Justice Black's opinion. Thus there is a square conflict between the Court of Appeals and at least part of the Supreme Court in an unusual situation where the majority of the Supreme Court has not made a final ruling (in their opinion the point was not properly raised in the *Berra* case) and where a Circuit Judge of the stature of Judge Frank states that he is in doubt as to the precise meaning of the *Berra* case.

The sentences imposed were imposed by the judge under the impression that the appellants were guilty of felonies and not misdemeanors. The sentences would have been substantially reduced if the sentencing judge had regarded the offenses as misdemeanors as urged upon him by appellants' trial counsel.

Since the decision of the *Berra* case there has been a great deal of discussion in legal periodicals about the meaning of it. Clarification is called for. This case presents the opportunity for a definitive ruling since in this case the questions were properly raised on the trial.

To recapitulate, therefore, we urge that the writ of certiorari should issue because this case bristles with constitutional questions which have been decided by the courts below in a manner probably in conflict with the decisions of this Court and certainly in conflict with the decision of the Fifth Circuit in *Clay* vs. *U. S.*, 218 Fed. 2nd, 483 and because the proper meaning of the *Berra* case and *Spies* case is

of great importance in the criminal prosecution of tax cases. It appears that the implications of those cases are not clearly understood by lawyers and judges. Since they affect an important field of Federal law this is an eminently proper case for review by the Supreme Court.

For the foregoing reasons it is respectfully requested that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

BERNARD AUSTIN,
Attorney for Petitioner-Appellant Ansell and Corporate Petitioner-Appellants,
401 Broadway,
New York 13, N. Y.

ISADORE B. HURWITZ,
Of Counsel.
401 Broadway,
New York 13, N. Y.

APPENDIX—OPINION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 392—October Term, 1955.

(Argued June 8, 1956 Decided August 20, 1956.)

Docket No. 24001

UNITED STATES OF AMERICA,

Appellee,

v.

H.J.K. THEATRE CORPORATION, JEANNE ANSELL and IRVING A. ROSENBLUM,

Appellants,

and

UNITED STATES OF AMERICA,

Appellee,

v.

JEANNE ANSELL, IRVING A. ROSENBLUM, H.J.K. THEATRE CORPORATION, K.B. THEATRE CORPORATION, K.L. THEATRE CORPORATION, ANSELL THEATRE CORPORATION, X.K. THEATRE CORPORATION, M.A.K. THEATRE CORPORATION, T & J THEATRE CORPORATION, K.A.S. THEATRE CORPORATION, J.A. THEATRE CORPORATION,

Appellants.

Before:

FRANK, HINCKS and WATERMAN,

Circuit Judges.

Appeal from judgments of conviction entered upon a jury's verdict of guilty, in the Southern District of New York. Affirmed.

PAUL W. WILLIAMS, U. S. Attorney for the Southern District of New York (Dennis C. Mahoney, Assistant U. S. Attorney, of Counsel), *Attorney for the United States of America.* 17, New York (Frederick H. Block and Robert B. Block, of Counsel), *Attorneys for Appellant Rosenblum.*

BERNARD AUSTIN (Isadore B. Hurwitz, of Counsel), *Attorney for Appellant Ansell and Corporate Appellants.*

FRANK, *Circuit Judge:*

Nine indictments and one information were consolidated for trial, and are consolidated for this appeal. In each of the first eight indictments, Jeanne Ansell, Irving Rosenblum and one of the several corporate defendants were charged in numerous counts with wilfully attempting to defeat and evade the payment of admissions taxes due the United States during the period May 1946 through March 1949 by filing false and fraudulent returns in violation of 26 U. S. C. Section 1718(b).[1] The ninth indictment charged

[1] Section 1718(b): "Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter who wilfully fails to collect or truthfully account for and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution."

Ansell and the J.A. Theatre Corporation with wilfully failing to account and pay over admissions taxes due the United States, in violation of 26 U. S. C. Section 1718(b). Both offenses charged under Section 1718(b) are felonies. The sole information charged Ansell and the J.A. Theatre Corporation with wilfully failing to file an admission tax return in violation of 26 U. S. C. Section 1718(a),[2] a misdemeanor.

Defendant Ansell was the president and apparently the owners of the corporate defendants. Rosenblum was the corporations' accountant and, at various times, was the treasurer of many of them. The corporations owned the leases of several motion picture theatres in which foreign films were exhibited. Defendants concede that the monthly admissions tax returns were false. But, at the trial, Ansell and Rosenblum each sought to place the blame for the filing of the fraudulent returns on the other.

There was evidence from which the jury could reasonably find the following: Ansell owned and operated the chain of theatres whose leases were owned by the corporate defendants; daily work sheets showing the amounts of taxes due the Government were prepared; from these, monthly summaries were made up; both Ansell and Rosenblum attempted to conceal the existence of the monthly summaries from the Government agents; during part of the indictment period, the tax monies that were collected were deposited in a special bank account, but Ansell drew

---

[2] Section 1718(a): "Any person required under this chapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this chapter, who wilfully fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution."

checks on this account for purposes other than the payment of taxes; Rosenblum had an interest in a corporation which had made loans to some of the corporate defendants; the tax returns were prepared by Rosenblum each month and signed by either him or Ansell; the J.A. Theatre Corporation never filed any return; all the filed returns substantially understated the total tax actually collected.

The jury found all the defendants guilty on all of the counts in which they were named. The trial judge fined each of the threatre corporations $500 on each count in which they were named, for a total of $106,000. The individual defendants, Ansell and Rosenblum, were each fined $100 for each count, for a total of $21,200 for Ansell and $21,000 for Rosenblum. In addition, Ansell was sentenced to a 2 year prison term on all the felony counts and to a 1 year term on each of the misdemeanor counts, sentence on all counts to run concurrently. Rosenblum received an 18 month concurrent prison sentence on each count. All the defendants appeal and raise a variety of grounds for reversal.

1. All defendants raise two objections which we shall consider first.

(1) Defendants, relying on *Berra* v. *United States,* 351 U. S. 131, contend that we should remand for resentencing under 26 U. S. C. 3616(a). They also suggest that the *Berra* case may require dismissal of the indictments. We reject defendants' contention for reasons stated in *United States* v. *Moran,* —— F. 2d —— (C. A. 2, / /56).*

The writer of this opinion has some doubt about that reasoning. The question considered by the Supreme Court in *Berra* was confined to the rejected request for an instruction to the jury. The Court did not discuss *Spies* v. *United States,* 317 U. S. 492 or *United States* v. *Beacon Brass Co.,* 344 U. S. 43. If those cases were pertinent, it would seem that the Court would have affirmed, merely citing those cases. There is language in *Berra* which can

* Now reported in 236 Fed. 2nd 361.

be read as holding that the coverage of the two statutes is in all respects identical, and that the question as to which statute applied was not for the jury but solely for the judge when he came to sentencing. *Berra* can then perhaps be construed to mean that the judge improperly imposed the sentence for conviction of a felony. On that interpretation, we should, in the instant case, remand for resentencing under the misdemeanor statute. However, the writer is not sure enough about the above interpretation of *Berra* to justify his dissenting here.

(2) Defendants further contend that, even if they were properly indicted for felonies under Section 1718(b), yet the evidence was insufficient to prove a "wilful" violation under the rule of *Spies* v. *United States,* 317 U. S. 492. In *Spies,* the defendant was indicted under a subsection of the Internal Revenue Code, similar to Section 1718(b), which made it a felony to wilfully attempt, "in any manner," to evade or defeat any tax. Another subsection made it a misdemeanor to wilfully fail to pay a tax or fail to make a return. Defendant was indicted for wilfully attempting to evade the income tax by failing to file a return or to pay a tax. The Supreme Court held that mere proof of a knowing failure to file a return or to pay a tax, without proof of any affirmative act of evasion on the part of the taxpayer, was insufficient to establish "wilfulness" under the felony provision. We think the *Spies* case is distinguishable from the case at bar; (a) If *Spies* is read to require some overt act evincing an "evil motive" to evade taxes (as compared with a wilful omission), then we think proof here of the wilful and knowing filing of the false returns is sufficient. (b) Even if the *Spies* case is read to mean that where, as here, the "manner" of evading taxes alleged in the indictment constitutes a misdemeanor, in and of itself,[3] some additional overt act tending to show an

[3] Under 26 U. S. C. Section 3616(a), the filing of a false or fraudulent return with intent to defeat or evade "the assessment intended to be made," constitutes a misdemeanor. The Supreme Court has held this section intended to punish the same conduct as Section 1718(b). *Berra* v. *United States,* 350 U. S. 131.

evil motive, and not necessary to prove the misdemeanor, must be shown,[4] we think *Spies* inapposite since such an overt act was here proved. There was evidence from which the jury could reasonably have found beyond a reasonable doubt that both Rosenblum and Ansell had concealed the existence of the monthly summaries of the admissions taxes from the Government. Rosenblum lied to a Government agent concerning these summaries, telling the agent that they did not exist. Ansell failed to reveal their existence when questioned by a Government agent concerning the method by which she obtained the figures for making up the tax returns. She stated that she obtained the figures from the employees in her office. These monthly summaries were never turned over to the Government. Consequently, many hours were spent assembling the information which the defendants had in summary form.

2. Ansell raises several additional points which we think are without merit:

We think the trial judge did not "abuse" his discretion in refusing separate trials. Rules 8(b) and 13 of the Federal Rules of Criminal Procedure; *United States* v. *Lebron*, 222 F. 2d 531, 535 (C. A. 2).

Ansell alleges that certain corporate checks and other records were obtained illegally by the Government, and claims the trial judge erred in denying her motion to suppress. These records were voluntarily turned over to the Government by Rosenblum, a corporate officer. As to the corporate records, we think Rosenblum had apparent and actual authority to give them to the Government and that there was no unlawful seizure. *Zap* v. *United States*, 328 U. S. 624; *United States* v. *Wolrich*, 119 F. Supp. 538. In any event, Ansell may not assert the constitutional rights of the corporations in her own behalf. *Lagow* v. *United States*, 159 F. 2d 245 (C. A. 2). As to Miss Ansell's personal checks, assuming *arguendo* that they were illegally

---

[4] *Clay* v. *United States*, 218 F. 2d 483 (C. A. 5).

obtained, we think their reception in evidence was harmless. Their use as evidence was indeed beneficial to her, since they tended to establish that she had spent personal funds for corporate purposes, thereby reimbursing the corporation for funds withdrawn by her.

The trial judge did not err in refusing Ansell's requested charge that the Government agents acting as witnesses were interested witnesses. The judge's charge on this point was adequate.

The final issue raised by Ansell is that the trial judge erred in not further limiting her cross-examination and the summation to the jury by Block, Rosenblum's attorney. Block had been the attorney for both Ansell and Rosenblum at the time Ansell appeared before the Grand Jury. He was later discharged by her but continued as Rosenblum's lawyer. No objection was made to Block's thus serving as Rosenblum's lawyer until he sought to cross-examine Ansell concerning her appearance before the Grand Jury.

We assume, *arguendo*, that Ansell correctly argues as follows: Where, as here, an attorney had represented two persons who later become defendants in a criminal prosecution, he remains under an obligation not to reveal any confidential communications made to him by either of these clients.[5] But even assuming that argument were correct, it would have no application here. For a careful examination of the record fails to reveal any such impropriety by Block. He based his cross-examination of Ansell on subpoenaed records, records obtained from the Government, a letter written to the Grand Jury, testimony of other witnesses at the trial which contradicted Ansell's testimony, and that part of Ansell's Grand Jury testimony which was made available to him by the trial judge.

---

[5] See McCormick, Evidence (1954) pp. 192-193; 8 Wigmore, Evidence, Section 2312; Anno. 141 A. L. R. 562; *Root* v. *Wright*, 84 N. Y. 72, 76; *People* v. *Abair*, 228 P. 2d 336; *People* v. *Kor*, 277 P. 2d 94; *State* v. *Archuleta*, 217 Pac. 619, 621; cf. *People* v. *Fernandez*, 301 N. Y. 302, 336-343.

Nor do we think Block's summation exceeded the bounds of proper advocacy. Although he attacked Ansell's credibility, nevertheless the testimony of the Government's witnesses, and Ansell's testimony on cross-examination by the Government and Block, amply justified his remarks. In addition, some of his remarks were in answer to questions, concerning his own character and integrity, raised by Ansell's testimony. He had a right so to reply. McCormick, Evidence (1954) page 194. If the jury was adversely affected by the fact that Ansell's former lawyer was critical of her, the fault was Ansell's, since Block's former representation of her was first brought out by her own lawyer at the trial, on his direct examination of Ansell.

3. Rosenblum's only additional contention is that the trial judge erred in restricting his attorney's access to the Grand Jury testimony of Ansell and in limiting the use of the disclosed Grand Jury testimony in his cross-examination of Ansell. After the Government has used Miss Ansell's Grand Jury testimony to impeach her,[6] Rosenblum's counsel asked to see the remainder of Ansell's Grand Jury testimony in order to impeach her. We do not think that he was entitled to have access to all of her testimony. However, where, as here, it is shown or alleged that the trial testimony of a witness against the defendant is contradictory of the witness' testimony before a Grand Jury, the rule in this circuit is that the defendant must be permitted to use the contradictory Grand Jury testimony to impeach the witness. The proper procedure is for the trial judge to read the Grand Jury minutes to determine whether the witness' trial testimony is contradictory; if it is, the judge should disclose to defendant that part of the witness' Grand Jury testimony which contradicts the witness' trial testimony; and if not, and if the defendant so requests, the judge should seal the witness' complete

[6] It is suggested that the Government, by using a portion of the Grand Jury minutes to impeach Ansell, waived its privilege to keep the balance secret. See *United States* v. *Krulewitch*, 145 F. 2d 76, 79 (C. A. 2); *United States* v. *Beekman*, 155 F. 2d 580, 584 (C. A. 2). We leave that question open.

Grand Jury testimony and make it part of the record on appeal.[7]

The trial judge in this case did not follow this procedure. Instead, he ruled that he would read into the record only that portion of Ansell's Grand Jury testimony which related to two matters on which the Government had cross-examined her, i.e., (1) her claim that she thought that the tax returns filed were only for part payment, and (2) the monthly tax summaries. However, the testimony actually read into the record also revealed (3) that Rosenblum had set up a separate tax account, and (4) that Ansell had given the tax figures to Rosenblum who made out the tax returns. In addition, Block had a copy of a prepared statement that Ansell had read to the Grand Jury.

---

[7] *U. S.* v. *Alper,* 156 F. 2d 222, 226 (C. A. 2); *U. S.* v. *Lebron,* 222 F. 2d 531, 536 (C. A. 2); *U. S.* v. *Cohen,* 145 F. 2d 82, 92 (C. A. 2); *U. S.* v. *Krulewitch,* 145 F. 2d 76, 78 (C. A. 2); *U. S.* v. *DeNormand,* 149 F. 2d 622, 625-626 (C. A. 2); *U. S.* v. *Beekman,* 155 F. 2d 580, 583-584 (C. A. 2).

The Government contends that *Remington* v. *United States,* 191 F. 2d 246, 261 (C. A. 2) should be construed to hold that, before a defendant may even inspect a witness' contradictory Grand Jury testimony, he must lay a foundation similar to that required before he introduces into evidence prior inconsistent statements. This interpretation of *Remington* we think is not warranted. Since the *Krulewitch* case, *supra,* which the Court cited in *Remington,* held precisely the opposite, and since the *Cohen* case, *supra,* also cited by the Court, contains no indication of such a requirement, we are loath so to interpret *Remington* so as to require this foundation. No other case in this circuit has imposed this additional requirement for the mere disclosure (as opposed to use as evidence) of contradictory Grand Jury or other privileged testimony. Of course, if defendant seeks to introduce the contradictory statements in evidence, he must lay a proper foundation. McCormick, Evidence (1954), Section 37.

In any event, in this case, the trial judge made it impossible for Rosenblum's attorney to lay the foundation apparently required by *Remington,* since he very clearly ruled that Rosenblum's attorney was to limit his cross-examination concerning Ansell's Grand Jury testimony to only the two matters touched upon by the Government in its cross-examination of Ansell.

The trial judge also ruled that he would limit Block's cross-examination of Ansell with respect to her Grand Jury testimony to only the two matters brought out by the Government in its cross (i.e., points (1) and (2) *supra*). He so ruled after Ansell's counsel objected to the cross-examination of his client by Block (who had represented her at the time of the Grand Jury hearing).

We think that Rosenblum's attorney was entitled to have all of Ansell's contradictory Grand Jury testimony read into the record and that he was entitled to cross-examine her concerning this testimony free from the limitations imposed by the trial judge. Statements made to a Grand Jury are not confidential communications which come within the attorney-client privilege. McCormick, *supra*, Sections 93, 95; 8 Wigmore, Evidence, Section 2311. The modern justification of the privilege is that it encourages full disclosure by a client to his lawyer and thereby promotes the interests of justice. 8 Wigmore, *supra*, Section 2291; McCormick, *supra*, Section 91. This purpose is not furthered by restricting an attorney's access to and use of Grand Jury testimony by a former client.

However, after examining the Grand Jury testimony by Ansell, which was sealed and made part of the record on appeal, and after comparing it with the trial testimony, we think that all the points in Ansell's Grand Jury testimony, which contradicted her trial testimony and which supported Rosenblum's defense, were adequately brought out at the trial. The testimony at the trial covered the following points which Rosenblum claims he was prevented from proving by the trial judge's rulings: (1) Rosenblum gave instructions that a special tax account be opened;[8]

---

[8] On direct examination by her attorney, Ansell testified that she thought Rosenblum had given instructions to open up a special tax account. On cross-examination, she testified that Rosenblum had never instructed her to open this account. Although her Grand Jury testimony would have tended to impeach this latter statement, we do not think that its exclusion by the trial judge was so prejudicial as to justify a new trial.

(2) Ansell had used the special tax account for purposes other than the payment of taxes;[9] and (3) Ansell had supplied Rosenblum with the figures for the tax returns.[10] Furthermore, Rosenblum's defense was assisted by the testimony of a Government witness that Ansell had stated to the witness that the entire fault was hers and that Rosenblum was not to blame for the filing of the false returns. Rosenblum's lawyer stressed this point again in his cross-examination of Miss Ansell. We are satisfied that the unrevealed portion of Ansell's Grand Jury testimony contained nothing which would have added weight to the impeachment of her trial testimony touching Rosenblum, impeachment already accomplished by that portion of her Grand Jury testimony which was read to the trial jury at the Government's behest. Thus the effect of the rulings made was not to leave her trial testimony against Rosenblum unimpeached. When her trial testimony as to a particular fact had been impeached by one passage in her prior testimony, we think it lay within the trial court's discretion to prevent, as unduly time-consuming and unimportantly cumulative, an inspection of, and cross-examination on, other passages in her previous testimony given as to the same matters on the same occasion before the Grand Jury. Indeed, the verdict against Ansell imports that the jury rejected her trial testimony to the effect that Rosenblum was solely to blame. This accomplished, further impeachment of her trial testimony could scarcely have affected the verdict against Rosenblum.

Affirmed.

---

[9] This was adequately brought out by the Government.

[10] This was shown by the testimony of Government witnesses, and was brought out again on the cross-examination of Ansell by the Government and Block.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 392—October Term, 1955.

(Petitions filed August 31, 1956 and September 4, 1956
Decided October 15, 1956.)

Docket No. 24001

UNITED STATES OF AMERICA,

Appellee,

v.

H. J. K. THEATRE CORPORATION, JEANNE ANSELL and IRVING A. ROSENBLUM,

Appellants,

and

UNITED STATES OF AMERICA,

Appellee,

v.

JEANNE ANSELL, IRVING A. ROSENBLUM, H. J. K. THEATRE CORPORATION, K. B. THEATRE CORPORATION, K. L. THEATRE CORPORATION, ANSELL THEATRE CORPORATION, X. K. THEATRE CORPORATION, M. A. K. THEATRE CORPORATION, T & J THEATRE CORPORATION, K. A. S. THEATRE CORPORATION, J. A. THEATRE CORPORATION,

Appellants.

Before:

FRANK, HINCKS and WATERMAN,

Circuit Judges.

On Petitions for Rehearing by Appellant Rosenblum and by Appellant Ansell and Corporate Appellants.

BLOCK & BLOCK, New York City (Frederick H. Block, of Counsel), *Attorneys for Appellant Rosenblum.*

BERNARD AUSTIN, New York City, *Attorney for Appellant Ansell and Corporate Appellants.*

PER CURIAM:

The petitions for rehearing are denied.

The opinion of the court is amended by substituting for the sentence beginning in the last line on page 2075 and the two subsequent sentences (on the top of page 2076) the following: "We think the *Spies* case is distinguishable from the case at bar for here there was evidence from which the jury could reasonably have found beyond a reasonable doubt not only the willful and knowing filing of false returns but also that both Rosenblum and Ansell had concealed the existence of the monthly summaries of the admission taxes from the Government."

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of October, one thousand nine hundred and fifty-six.

PRESENT:

HON. JEROME N. FRANK,
HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN, Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

H. J. K. THEATRE CORP., JEANNE ANSELL and IRVING A. ROSENBLUM,
Defendants-Appellants,

and

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JEANNE ANSELL, IRVING A. ROSENBLUM, *et al.*,
Defendants-Appellants.

Petitions for a rehearing having been filed herein by counsel for appellant Rosenblum and for appellant Ansell and Corporate appellants.

Upon consideration thereof, it is

Ordered that said petitions be and hereby are denied.

Further Ordered that the opinion of this Court dated August 20, 1956 be and it hereby is amended in accordance with an opinion of this Court dated October 15, 1956.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 20th day of August, one thousand nine hundred and fifty-six.

PRESENT:

HON. JEROME N. FRANK,
HON. CARROLL C. HINCKS,
HON. STERRY R. WATERMAN, Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

H. J. K. THEATRE CORPORATION, *et al.*,
Defendants-Appellants.
(and 9 other cases)

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgments of said District Court be and they hereby are affirmed.

A. DANIEL FUSARO
Clerk

By RALPH C. CURCIO
Deputy Clerk

INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statutes involved	2
Statement	4
Argument	7
Conclusion	18

CITATIONS

Cases:

Achilli v. *United States*, 234 F. 2d 797, certiorari denied, November 19, 1956 (No. 430, this Term) — 17

Adams v. *New York*, 192 U. S. 585 — 14

Berra v. *United States*, 351 U. S. 131 — 17

Clay v. *United States*, 218 F. 2d 483 — 8

Doyle v. *United States*, 234 F. 2d 788, certiorari denied, November 5, 1956 (No. 386, this Term) — 17

Gaunt v. *United States*, 184 F. 2d 284, certiorari denied, 340 U. S. 917 — 9

Holland v. *United States*, 348 U. S. 121 — 9

Johnson v. *United States*, 318 U. S. 189 — 12

Rick v. *United States*, 161 F. 2d 897 — 9

Smith v. *United States*, 348 U. S. 147 — 9

Spies v. *United States*, 317 U. S. 492 — 7, 8

United States v. *Beacon Brass Co.*, 344 U. S. 43 — 9

United States v. *Croessant*, 178 F. 2d 96, certiorari denied, 339 U. S. 927 — 9

United States v. *Moran*, 236 F. 2d 361, certiorari denied, November 13, 1956 (No. 417, this Term) — 17

United States v. *Raub*, 177 F. 2d 312 — 9

Weeks v. *United States*, 232 U. S. 383 — 14

Statutes:

Internal Revenue Code of 1939:

Secs. 145 (a), (b) — 8

Secs. 1718 (a), (b) (26 U. S. C. 1952 ed., Secs. 1718 (a), (b)) — 4, 7, 16

Sec. 3616 (a) (26 U. S. C. 1952 ed., Sec. 3616 (a)) — 3, 17, 18

Miscellaneous:

Federal Rules of Criminal Procedure, Rule 12 (b) (2) — 17

In the Supreme Court of the United States

OCTOBER TERM, 1956

Nos. 576 and 577

IRVING A. ROSENBLUM, JEANNE ANSELL, H. J. K. THEATRE CORPORATION, K. B. THEATRE CORPORATION, K. L. THEATRE CORPORATION, ANSELL THEATRE CORPORATION, X. K. THEATRE CORPORATION, M. A. K. THEATRE CORPORATION, T. & J. THEATRE CORPORATION, K. A. S. THEATRE CORPORATION, AND J. A. THEATRE CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 1a–11a; Pet. R. 13–24)[1] is reported at 236 F. 2d 502.

---

[1] The petition filed on behalf of Ansell and the corporations (No. 577) is designated "Pet."; that filed on behalf of Rosenblum (No. 576), "Pet. R."

JURISDICTION

The judgment of the Court of Appeals was entered on August 20, 1956 (Pet. 15a), and petitions for rehearing were denied on October 15, 1956 (Pet. 14a). The petitions for writs of certiorari were filed on November 14, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the verdict.

2. Whether the trial court unduly restricted or unduly enlarged the right of Rosenblum's counsel, who had formerly also represented Ansell, to cross-examine Ansell.

3. Whether the trial court erred in denying the motion to suppress evidence made on behalf of Ansell and the corporations.

4. Whether the trial court erred in sentencing petitioners under Section 1718 (b) of the Internal Revenue Code of 1939 rather than Section 3616 of the Code.

STATUTES INVOLVED

Internal Revenue Code of 1939:

> SEC. 1718. PENALTIES.
>
> (a) Any person required under this chapter to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this chapter, who willfully fails to pay such

tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.

(b) Any person required under this chapter to collect, account for and pay over any tax imposed by this chapter who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfuly attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 1718.)

SEC. 3616. PENALTIES.

Whenever any person—

(a) *False returns.* Delivers or discloses to the collector or deputy any false or fraudulent list, return, account, or statement, with intent to defeat or evade the valuation, enumeration, or assessment intended to be made; * * * he shall be fined, not exceeding $1,000, or be imprisoned not exceeding one year, or both, at the discretion of the court, with costs of prosecution.

(26 U. S. C. 1952 ed., Sec. 3616.)

STATEMENT

In June, 1952, eight indictments were filed against petitioners Ansell and Rosenblum (each naming a separate corporate defendant) in the United States District Court for the Southern District of New York, charging them with wilful attempts to evade and defeat excise taxes on theatre admissions collected by the corporations between May, 1946, and April, 1949, by filing false and fraudulent tax returns in violation of Section 1718 (b) of the Internal Revenue Code of 1939. (R. 2346, 2468, 2476, 2484, 2492, 2500, 2507, 2516.)[2] At the same time, an indictment and an information were filed against Ansell and the J. A. Theatre Corporation, charging them with wilfully failing to account for and pay over admissions taxes for May, 1949, and with wilfully failing to file a return for that month, in violation of Sections 1718 (b) and 1718 (a), respectively (R. 2524, 2530.) There were 212 counts altogether, alleging (*in toto*) that the admissions taxes collected were $348,713.94, of which only $149,673.65 was reported on the returns. After a jury trial, all defendants were found guilty on all counts. (R. 2249–2252.) On January 10, 1956, Ansell was sentenced to two-year concurrent prison sentences on each of the 212 counts; Rosenblum, to eighteen-month concurrent prison sentences on each of 210 counts. In addition, they were fined $100 on each count, a total fine of $21,200 against Ansell and

[2] References are to the typewritten transcript of trial (pp. 1 through 2345) and the original papers constituting Record on Appeal to the Court of Appeals (pp. 2346 through 2536).

$21,000 against Rosenblum. Each of the theatre corporations was fined $500 on each count in which it was named, a total of $106,000. (R. 2315–2326.)

The evidence to support the verdict may be summarized briefly as follows:

During the years in question, the corporate petitioners owned and operated theatres in New York City, exhibiting Spanish motion picture films. Jeanne Ansell was president of the corporations and the stock was held in her name and the names of her relatives.[3] Rosenblum, who owned none of the stock, served as treasurer and accountant. (R. 225–226, 629, 633, 723–726, 1022–1023, 1301, 1335, 1395, 1418, 1465–1467, 1604; Govt. Exs. 1–8, 26). He received a fee of $350 to $600 per month and in addition had a substantial interest in the Burns Trading Corporation, which helped finance some of the theatres. (R. 709–710, 1382–1383, 1387–1388, 1393, 1478–1479, 1920.) Only Ansell and Rosenblum had authority to sign corporation checks. (R. 533, 629, 1394.)

The Government proved the understatements of tax by the corporations' own records. The cashiers at each theatre kept tally sheets showing hourly admissions and admissions tax collected, which were turned in, each day, to the office of the Ansell Theatre Corporation, where the books of all the corporations were kept and where Ansell had her office. (R. 74–84, 487–488, 491–493, 1032.) These sheets were first checked for accuracy by each cashier against the amount of

[3] There is no evidence that Ansell's relatives contributed capital for the shares listed in their names or had any voice in the corporate management.

cash she had taken in, and later by an office employee, who made sure that they agreed with the bank deposits. (R. 235–239, 479–480, 489.) Each month, a "tax schedule" would be prepared for each theatre, consisting of a summary of the daily tally sheets, showing the total admissions tax due. These schedules would sometimes be given to Ansell and sometimes mailed to Rosenblum, whose office was several blocks away. (R. 481–484, 490–492.) Although Rosenblum turned over the daily tally sheets to the Treasury agents (R. 301, 958), he denied the existence of the tax schedules (R. 751, 767, 1888–1889).[4] It was therefore necessary for the agents to reconstruct the taxes by summarizing the thousands of daily tally sheets. This reconstruction was in substantial agreement with the figures in the indictment, proving a total understatement of tax of approximately $199,000.00. (R. 64–74; Govt. Exs. 12–21.)

All of the tax returns in question were prepared by Rosenblum and most of them were signed by Ansell. (R. 961–962, 1309–1311, 1322–1328, 1416; Govt. Exs. 1–8.)

It was shown that during a part of the period named in the indictment the corporations maintained a special bank account into which the admissions taxes collected were deposited. The account was never used, however, for the purpose of paying taxes, Ansell withdrawing substantial amounts of cash from it and writ-

[4] Rosenblum's attorney conceded, outside the jury's presence, that Rosenblum had lied when he said he had never seen the tax schedules. (R. 272.)

ing checks for general corporate expenses. (R. 305, 315, 681–682, 1336–1381; Govt. Ex. 24.) Many of the checks drawn on this account were traced into Ansell's personal bank account. (R. 302–303, 339.)

At the trial, Ansell conceded that the tax returns were false but placed the entire blame on Rosenblum. (R. 1301–1308, 1311–1314, 1329, 1416–1418, 1501.) Her trial testimony was inconsistent with her pre-indictment admissions to representatives of the Internal Revenue Service and to the grand jury (before which she appeared at her own request) that she had always supplied Rosenblum with the figures for the returns and that if anything was wrong it was her fault. (R. 953, 959, 1422–1423, 1577–1579.) Rosenblum did not testify at the trial. His attorney conceded, in his summation to the jury, that Rosenblum had known the returns were false. (R. 2037.)

ARGUMENT

1. The petitioners contend (Pet. 34–36, Pet. R. 7–8) that the evidence was insufficient to support convictions for violating Section 1718 (b) of the Code (*supra*, p. 3), a felony provision, because it showed only the filing of false returns. They argue that such a showing does not satisfy the requirement, laid down in *Spies* v. *United States*, 317 U. S. 492, that in a tax evasion case the Government must prove some affirmative act of evasion. Therefore, in their view, the indictment and proof here showed only a violation of Section 1718 (a), making it a misde-

meanor to wilfully fail to file a return or pay a tax.[5] The contention is without merit.

In the *Spies* case, a conviction for income tax evasion was had on an indictment and proof which showed only acts of omission—failure to file a return and pay a tax. This Court reversed the conviction on the ground that no affirmative act of evasion had been alleged or proved, stating (317 U. S. at 499):

> We think that in employing the terminology of attempt to embrace the gravest of offenses against the revenues, Congress intended some willful commission in addition to the willful omissions that make up the list of misdemeanors. Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax in any manner or to defeat it by any means lifts the offense to the degree of felony.

Clearly, the *Spies* case is not in point here, where the proof conclusively shows affirmative acts, *i. e.*, the filing of false returns.[6] It is well settled that the wil-

---

[5] Sections 1718 (a) and 1718 (b) of the Code, relating to admissions taxes, are analogous to Sections 145 (a) and 145 (b), relating to income taxes.

[6] Petitioner Rosenblum is clearly incorrect in his contention that in the instant case the Court of Appeals construed the *Spies* case as requiring "more than the mere filing of false returns". (Pet. R. 7.) The court merely pointed out that in this case there was at least one affirmative act of evasion in addition to the filing of the false returns. (Pet. R. 17–18, 26.)

Equally without merit is Ansell's contention (Pet. 35) that there is a conflict between the instant case and *Clay* v. *United States*, 218 F. 2d 483 (C. A. 5th). The indictment in that case alleged a mere act of omission, *i. e.*, that the tax was not paid.

ful filing of a false return understating the amount of tax due violates the tax evasion (felony) provisions of the Code. *United States* v. *Beacon Brass Co.*, 344 U. S. 43, 46; *Holland* v. *United States*, 348 U. S. 121, 125, 139; *Smith* v. *United States*, 348 U. S. 147, 149, 159; *Gaunt* v. *United States*, 184 F. 2d 284, 288 (C. A. 1st) certiorari denied, 340 U. S. 917; *United States* v. *Croessant*, 178 F. 2d 96 (C. A. 3d), certiorari denied, 339 U. S. 927; *United States* v. *Raub*, 177 F. 2d 312, 315 (C. A. 7th); *Rick* v. *United States*, 161 F. 2d 897, 898–899 (C. A. D. C.).

Assuming, *arguendo*, that the proof must show something more than the filing of false returns, it is clear that such a showing was made here. Rosenblum prepared the false returns; Ansell signed them. Both of them concealed the existence of the monthly tax schedules (showing the correct amount of tax) from the Treasury agents. Finally, it was shown that Ansell, with the knowledge of Rosenblum, made extensive drawings for non-tax purposes against the special bank account set up for the deposit of admissions taxes collected. (*Supra*, pp. 6–7; R. 272, 302–305, 339, 492, 956–957, 961–962, 1336–1381, 1888–1889, Govt. Ex. 24.)

2. Rosenblum contends (Pet. R. 8–9) that his attorney, Block, was unduly restricted by the trial judge in his cross-examination of Ansell. Ansell contends (Pet. 10–19, 27–30) that Block was permitted to go too far in this respect, in view of the fact that he had formerly represented her in connection with her tax troubles. We believe that the trial judge wisely exercised his discretion in drawing the line

where he did between the conflicting interests of the two petitioners.

(a) Rosenblum's specific complaint (Pet. R. 8) is that Block should have been permitted to use all of a statement read by Ansell to the grand jury, rather than only a part of it, to impeach her. The subject of Ansell's appearance before the grand jury was first brought out on her direct examination, when she testified that at Rosenblum's urging she had requested permission to appear there as a sort of character witness for him. (R. 1422–1423.) The Government then brought out, on its cross-examination, that there were two important contradictions between Ansell's trial testimony and her testimony before the grand jury. (R. 1497–1499.)[7] Block asked to examine the grand jury minutes (R. 1503) and the trial judge ruled that he would read into the record all of Ansell's grand jury testimony relating to the matters about which the prosecutor had questioned her (R. 1504). The judge did so, with the exception of the written statement in question, which Block had prepared for Ansell three years earlier and of which he had a copy. (R. 1499, 1572–1580A.) When Block sought to use this statement in cross-examining Ansell, the court ruled that he could not go beyond those

[7] Ansell admitted before the grand jury that she had seen the monthly tax schedules, showing the correct taxes due, and claimed that she had intended the tax returns to represent only a part-payment. At the trial she denied any knowledge of these matters, testifying that she had signed 80% of the returns in blank and had not even read the other 20%, relying entirely upon Rosenblum to enter the correct figures. (R. 1301–1319, 1329, 1497–1499.)

portions relating to the contradictions brought out by the prosecutor. (R. 1680–1688.) One reason for this ruling was that Block himself had prepared the statement for Ansell at a time when he represented her. (R. 1682.)

The Court of Appeals held (Pet. R. 21–23) that the trial court should have permitted Block to use all of Ansell's grand jury testimony which was contradictory of her trial testimony to impeach her, but found that all such contradictions "were adequately brought out at the trial" and that "the unrevealed portion of Ansell's grand jury testimony contained nothing which would have added weight to the impeachment of her trial testimony touching Rosenblum" (Pet. R. 23, 24). The Court also pointed out that the jury's verdict against Ansell imports that her credibility was thoroughly impeached without the additional cross-examination Block proposed to conduct. (Pet. R. 24.)[8] We submit that no further review of Rosenblum's contention is warranted, especially in view of the unusual circumstances present here, where the attorney who demands grand jury testimony of a witness for the purpose of impeaching her represented that witness in the matter at the time she appeared before the grand jury.

---

[8] We do not understand how that portion of Ansell's statement to the grand jury quoted by Rosenblum (Pet. R. 8–9) could have been of any aid to him. That paragraph shows that Rosenblum had available to him, at the time he prepared the false returns, accurate records showing the correct tax due, and at least implies that Rosenblum advised Ansell that it was all right to file returns disclosing only a part of the tax liability.

(b) Ansell's complaint is the reverse of Rosenblum's. She contends (Pet. 10–19, 27–30) that Block went beyond the bounds of propriety in cross-examining her, that he violated the attorney-client privilege, and that he was in effect a witness against her because the jury knew he had previously represented her.[9] No objection to Block's representation of Rosenblum was made until after the Government had rested its case, nor was any motion for a severance made before the trial. Ansell argues that she has nevertheless not waived the point because she "could not know what turn the trial would take" or what Block's strategy would be. (Pet. 28.) This argument is without merit. Ansell must have known at the beginning of the trial that she would recant her prior statements and try to place the blame for the false returns entirely upon Rosenblum (*supra,* p. 7 and fn. 7, p. 10); otherwise, as owner and president of the corporations and signer of most of the false returns, she would have virtually no chance for an acquittal. She must also have known that Block would then be obliged to attack her credibility. She forced this course upon him by the position she took at the trial. She is in no position to complain at this stage of the proceedings. Cf. *Johnson* v. *United States,* 318 U. S. 189, 200–201.

---

[9] The argument that Block was in effect a witness against Ansell refers mainly to Block's summation to the jury. (Pet. 19.) No objection was made to the summation at the trial, nor does Ansell contend, even now, that Block's statements were not supported by the evidence. As for the jury's knowledge that Block had formerly represented her, that fact was first brought out by Ansell on direct examination. (Pet. 30, 8a.)

Ansell's argument that Block violated the lawyer-client privilege is that had he not represented her earlier he would not have known about a letter she had written to the grand jury, requesting permission to appear, or about "subpoenaed court records". (Pet. 29.) But the record is clear that it was Ansell's attorneys who first brought out that she had requested permission to appear before the grand jury (R. 1422–1423)[10] and the "subpoenaed court records" can refer only to litigation involving theatre corporation matters with which Rosenblum was always familiar (R. 1510–1519). The facts amply support the conclusion of the Court of Appeals (Pet. 7a) that "a careful examination of the record fails to reveal any such impropriety by Block" as the use of any confidential communications made to him by Ansell.

We submit that when Block undertook to cross-examine Ansell, his former client, the trial judge was confronted with a most unusual situation; that in setting the limits on that examination the judge exercised his discretion in such a manner that the rights of both Ansell and Rosenblum were protected; and that Block was guilty of no impropriety.

3. The contention made on behalf of Ansell and the corporations (Pet. 16–26, 30–33) that their convictions cannot stand because much of the Government's evidence was obtained by means of an illegal search and seizure has no substance. The records in question consist of (a) books and records of the

[10] Petitioner makes no attempt to explain how this letter to the grand jury may have been prejudicial to her.

corporations and (b) some of Ansell's personal canceled checks.

(a) In the spring of 1949, when the investigation began, the books and records of all the corporations were maintained at Ansell's office. (R. 63, 70, 74, 80–86, 487–488, 491–493, 503–504.) The Revenue Agent who first examined the records there died before the trial. (R. 66, 79, 765.) After working alone for three or four weeks, this agent was joined by others who worked with him at the same location for about six weeks. (R. 63, 83–89, 764–765.) Rosenblum, with whom the agents conferred before starting their examination, appeared once or twice at Ansell's office while the agents were at work there. (R. 63, 89, 92, 98–99.) In the fall of 1949, Rosenblum suggested that the agents conduct the balance of their examination in his office, five blocks away, because "The Ansell offices are small; it is crowded * * *." (R. 89, 1064.) The agents agreed and from then on worked at the office of Rosenblum, who at all times turned over without protest all the corporate books and records requested of him, except that he denied the existence of the schedules showing the correct tax liability. (R. 246–250, 256, 320–322, 958, 1064–1065, 1888.)

On petitioners' motion to suppress evidence, heard at the close of the Government's case,[11] Ansell testi-

[11] The trial court need not have granted such a hearing, no motion to suppress having been made before the trial. *Weeks* v. *United States*, 232 U. S. 383, 394–396; *Adams* v. *New York*, 192 U. S. 585, 594–595.

fied that she had never authorized Rosenblum to turn any records over to the Treasury agents and until 1951 had even been unaware of the fact that the examination was being conducted. (R. 1023.) She did not deny that she was present in her office during the nine weeks the Treasury agents worked there, but claimed she may have thought they were conducting an audit for the corporations' insurance company, because none of her four office employees had told her they were from the Internal Revenue Service. (R. 1043–1044.) This was in sharp conflict with her statement to the grand jury (Pet. R. 9) that she had kept her "records intact and promptly turned them over to the Government's agents when they first requested them." Obviously, the trial court was fully justified in denying the motion to suppress evidence and the Court of Appeals was correct in concluding (Pet. 6a) that the "records were voluntarily turned over to the Government by Rosenblum, a corporate officer" who had "apparent and actual authority to give them to the Government * * *."

(b) Ansell contends that Rosenblum had no authority to turn over to the agents certain of her personal canceled checks. In the first place, we submit that the agents were justified in believing that Rosenblum was representing Ansell as well as her corporations (R. 907), for it was he, as the accountant, with whom they had dealt throughout the investigation. More important, the record shows that the checks in question could not have prejudiced Ansell; they tended to aid her. It was shown that Ansell had commingled her personal banking transactions with those of the cor-

porations. She received the proceeds of corporate checks drawn to cash, deposited into her own bank account the proceeds of corporate borrowings, and diverted other funds from the corporations' bank accounts into her own. (Supra, pp. 6–7; R. 493, 819.) The total of these diversions was $356,131.15, as against $167,757.83 refunded to the corporation by Ansell. (R. 903.) Plainly, proof of the amounts so restored to the corporations tended to benefit Ansell, and it was here that her personal checks came into play. They showed that she had expended from her own bank account $53,251.87 on behalf of the corporations, and this amount was a part of the total $167,757.83 refunded. (R. 908–909.) These personal checks written for business purposes were the only checks of Ansell ever submitted to the agents, and they were returned to Rosenblum within a few days. Although the agents asked Rosenblum to turn over Ansell's other personal checks, he never did so. (R. 332–333, 699, 898, 1898–1902.) It is clear that the record supports the conclusion of the Court of Appeals that the use of the checks in question "was indeed beneficial to her, since they tended to establish that she had spent personal funds for corporate purposes * * *." (Pet. 7a.)

4. Petitioners' final contention (Pet. 36–38, Pet. R. 9–11) is that the trial court erred in sentencing them under the statute making evasion of admission taxes a felony (Section 1718 (b), *supra*, p. 3), and that they should have been sentenced under Section 3616

(a), a misdemeanor statute (*supra,* p. 3).[12] The Court of Appeals considered this question on the merits and decided it adversely to the petitioners (Pet. 4a–5a), even though it had not been properly raised in the trial court. Although it is desirable that the questions arising from the overlap of Section 3616 (a) and the various felony provisions of the Internal Revenue Code of 1939 (see *Berra* v. *United States,* 351 U. S. 131) be resolved, this case does not appear to be a suitable vehicle for review. Here, the issue of Section 3616 (a) was raised only in the motion for acquittal made at the close of the Government's case (R. 1134–1141) and was never mentioned again in the trial court. None of the petitioners challenged the validity of the indictment by pre-trial motion as required by Rule 12 (b) (2), Federal Rules of Criminal Procedure, nor did they question the legality of the sentences in the trial court.[13] Moreover, there is a further reason why this case is peculiarly inappropriate for the resolution of the problem. None of the fines

---

[12] Rosenblum also contends (Pet. R. 10–11) that he was prejudiced by submission of the case to the jury as a felony because, in view of his background and reputation, the jury might have acquitted him had the charges been submitted as misdemeanors. It would seem that, if anything, a jury would be more reluctant to convict of a felony than a misdemeanor.

[13] In several other cases in which the issue was not properly raised in the trial court, this Court has recently denied the writ. *Doyle* v. *United States*, 234 F. 2d 788 (C. A. 7), certiorari denied, November 5, 1956 (No. 386, this Term); *Achilli* v. *United States*, 234 F. 2d 797 (C. A. 7), certiorari denied, November 19, 1956 (No. 430, this Term); *United States* v. *Moran*, 236 F. 2d 361 (C. A. 2), certiorari denied, November 13, 1956 (No. 417, this Term).

($100 per count against the individuals; $500 per count against the corporations) exceeded those which could have been imposed under Section 3616 (a). And the two-year concurrent jail sentences imposed on Ansell and the eighteen-month concurrent sentences imposed on Rosenblum are applicable to each of 212 and 210 counts, respectively.

CONCLUSION

For the reasons stated, the petitions for writs of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.
CHARLES K. RICE,
Assistant Attorney General.
JOSEPH M. HOWARD,
RICHARD B. BUHRMAN,
Attorneys.

DECEMBER 1956.

U. S. GOVERNMENT PRINTING OFFICE: 1956

FILED
JAN 9 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

No. 576

IRVING A. ROSENBLUM,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER ROSENBLUM

FREDERICK H. BLOCK
Attorney for Petitioner
295 Madison Avenue
New York 17, N. Y.

INDEX

CITATIONS

PAGE

Cases:

Berra v. *United States*, 351 U. S. 131 3

Berra v. *United States*, 8 Cir., 221 F. 2d 590 4

Dillon v. *United States*, 8 Cir., 218 F. 2d 97 4

Holland v. *United States*, 348 U. S. 121, 139 ..... 1, 2

Imholte v. *United States*, 8 Cir., 226 F. 2d 585, 588 1

Masi v. *United States*, 5 Cir., 223 F. 2d 132, cert. den. 350 U. S. 919 4

Smith v. *United States*, 348 U. S. 147 2

Spies v. *United States*, 317 U. S. 492 ..... 1, 2

United States v. *Johnson*, 319 U. S. 503, 514 1

United States v. *Kalodny*, 2 Cir., 149 F. 2d 210 4

United States v. *Norris*, 2 Cir., 205 F. 2d 828, 829 1

Williams v. *United States*, 168 U. S. 382, 389 4

Statutes:

Internal Revenue Code of 1939:

Sec. 145(a) 1

Sec. 3616(a) 3, 4

Miscellaneous:

Rule 7(c), Federal Rules of Criminal Procedure 4

IN THE

Supreme Court of the United States

No. 576

IRVING A. ROSENBLUM,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONER ROSENBLUM

I.

We differ with the Government's view that *Spies* v. *United States,* 317 U. S. 492, has no application to a filing of false returns as distinguished from a failure to file a return and pay a tax (Govt. Br. pp. 7-9). In *Holland* v. *United States,* 348 U. S. 121, 139, this Court clearly applied *Spies* to a false filing case. See also *United States* v. *Norris,* 2 Cir., 205 F. 2d 828, 829, and *Imholte* v. *United States,* 8 Cir., 226 F. 2d 585, 588. And compare *United States* v. *Johnson,* 319 U. S. 503, 514, where this Court said that the filing of false returns "may be only a misdemeanor under §145(a) of the Internal Revenue Code."

The court below said in its amended opinion in the present case (Rosenblum Pet. p. 26):

> "We think the *Spies* case is distinguishable from the case at bar for here there was evidence from which the jury could reasonably have found beyond a reason-

able doubt not only the wilful and knowing filing of false returns but also that both Rosenblum and Ansell had concealed the existence of the monthly summaries of the admission taxes from the Government."

This was a similar construction of *Spies* and clear recognition that an affirmative act apart from false filing is required. If the decisions of the Courts of Appeals cited by the Government are to the contrary, then review should be had to clarify the scope and meaning of *Spies* and resolve the conflict between the Circuits. Certainly *Holland* v. *United States, supra,* and *Smith* v. *United States,* 348 U. S. 147, cited in the Government's brief (p. 9) presumably as the latest pronouncements by this Court on the subject, do not support the present conviction. In the *Holland* case, the defendant taxpayer kept false books and in the *Smith* case, no books at all, whereas full and accurate books were kept in this case under petitioner's supervision. In *Holland* (at p. 139), moreover, this Court took pains to point out that the requisite specific intent or wilfulness could be inferred from "evidence of a consistent pattern of under-reporting large amounts of income *and of the failure on petitioners' part to include all of their income in their books and records*" (italics ours), thereby plainly indicating that a pattern of under-reporting, standing alone as in this case, is not enough.

If an affirmative act is required, the conviction should not stand because no such act was proven. The Government has not attempted to answer our repeated observation (Pet. pp. 2, 5, 7) that the only affirmative act which the court below was able to cite in support of petitioner's conviction was a single untruthful statement as to the existence of some cumulative and altogether inconsequential memoranda.

II.

The Government attempts to defend the restrictions placed upon petitioner's cross-examination of Ansell by saying that the ordinary rules were inapplicable because petitioner's counsel had earlier represented Ansell (Govt. Br. pp. 10-11). If there was no impropriety in the conduct of petitioner's counsel, as the Government concedes (Govt. Br. pp. 12-13), then it is difficult to see why the restrictions were proper. No authority is cited for what was a significant diminution of a defendant's major right—the right of cross-examination.

The attempt to minimize the importance of the excluded evidence (Govt. Br. p. 11, fn. 8) is specious. Assuming, *arguendo,* that petitioner had advised Ansell that it was all right to file returns disclosing only a part of the tax liability, the issue was his intent in so doing. The excluded evidence negatived any intent on petitioner's part to cheat the Revenue, for it showed that he had advised careful preservation of the records in anticipation of a thorough audit and full payment of the balance due (Rosenblum Pet. 8).

III.

The Government concedes that this Court should clarify its decision in *Berra* v. *United States,* 351 U. S. 131, but takes the position that this case is not a suitable vehicle for review because the point was not properly raised in the trial court (Govt. Br. pp. 17-18). The Government relies for authority on cases in which the point was not raised at all except on appeal.

The contention that §3616(a) of the 1939 Internal Revenue Code governs this prosecution was pressed vigorously

on the trial judge (1134 *et seq.*).* His rejection of the contention was so incisive as to make it clear that persisting in it would not only have been futile but offensive to the court. Thus, after argument at the close of the Government's case, the court said (1140):

> "You don't need to argue it any further, Mr. Block. It is as clear as can be in my mind. If I am wrong, you have a remedy."

The state of authority was unchanged at the sentencing on January 10, 1956, and there was nothing additional to be urged on the trial judge at that time to alter his previously announced view that the offenses charged were felonies.

We fail to perceive what more could have been done to press the point. The Government's suggestion that the indictment should have been attacked by pre-trial motion (Br. p. 17) is clearly erroneous because the only basis therefor would have been the miscitation of statute, which is a harmless irregularity. Rule 7(c), Federal Rules of Criminal Procedure; *Williams* v. *United States,* 168 U. S. 382, 389; *Masi* v. *United States,* 5 Cir., 223 F. 2d 132, *cert. den.* 350 U. S. 919; *United States* v. *Kalodny,* 2 Cir., 149 F. 2d 210.

Petitioner's eighteen month concurrent prison sentence exceeded the maximum if the offenses are misdemeanors. True, consecutive sentences under §3616(a) could aggregate a much longer term, as the Government implies (Br. p. 18); but we doubt that this Court will indulge such speculation. If the offenses are misdemeanors, the trial judge,

---

* This was on December 7, 1955, long before *Berra* was decided by this Court. At that time, the only appellate rulings were adverse determinations by the Eighth Circuit in *Dillon* v. *United States,* 218 F. 2d 97, and *Berra* v. *United States,* 221 F. 2d 590.

in resentencing, could hardly fail to impose a shorter sentence than he imposed on the theory that the offenses are felonies. This, we believe, is the true point of the matter.

Dated: New York, N. Y.
January 7, 1957.

Respectfully submitted,

FREDERICK H. BLOCK
Attorney for Petitioner
295 Madison Avenue
New York 17, N. Y.

FILED
JAN 2 4 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM—1956

#577

JEANNE ANSELL,

Petitioner,

AGAINST

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

BERNARD AUSTIN,
Attorney for Petitioner,
No. 401 Broadway,
New York 13, N. Y.

ISADORE B. HURWITZ,
Of Counsel,
No. 401 Broadway,
New York 13, N. Y.

LODER APPEAL PRESS, INC., 65 Duane Street, N. Y. C. WOrth 2-0689

IN THE

Supreme Court of the United States

OCTOBER TERM—1956

#577

JEANNE ANSELL,

Petitioner,

AGAINST

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

Petitioner Jeanne Ansell respectfully prays for a rehearing of the order of this Court dated January 14, 1957 denying her petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

I.

The first question presented in the original petition for certiorari was whether petitioner had been deprived of the rights guaranteed to her by the Fifth and Sixth Amendments of the Federal Constitution by virtue of her former lawyer's summation to the jury on behalf of her co-defendant Rosenblum which had the effect of making her former lawyer, Mr. Frederick Block, a witness against her. Rehearing is requested on this point for the following reason:

The damage that Mr. Block's summation did to the petitioner was conceded in the opinion of the Court of Appeals (page 8a of original petition) and in the Government's Brief in opposition to the petition for certiorari at page 12. It is also beyond argument that if Mr. Block were the Government prosecutor, his summation would have been reversible error. See especially Block's statements from his summation recited at page 16 of the original petition quoting from page 2047 of the trial record:

> "She (referring to Ansell) didn't care about how that charge against me made me look as a lawyer, putting a client before a grand jury with me knowing that the client could be indicted, but suggesting that the client go in before the grand jury on what amounts to a pretext or a ruse. That is the charge that this woman saw fit to make against me, and I say that if she could say that about me—and it is false, as you well know it is false—and as these documents show, then she could say anything about anybody, including all these charges that she has made about Irving Rosenblum" (R. 2047).

Berger v. *U. S.*, 295 U. S. 78, 88;
People v. *Tassiello*, 300 N. Y. 425.

The teachings of these cases are that a prosecutor may not make himself an unsworn witness against the accused in summation. To be sure Mr. Block was not the *de jure* prosecutor on this trial. However, he was a *de facto* prosecutor. This appears from Mr. Block's summation at page 2070 of the trial record quoted on page 17 of the original petition for certiorari and which we quote herein again:

> "Wasn't it his obligation as a government prosecustor to go in there and thoroughly expose Ansell? Was it my job? It was my job to expose her on the

> things I had but the grand jury minutes are secret documents and defendants only have limited rights in them, but they are not restricted, as far as Mr. Mahoney is concerned" (R. 2070).

On page 12 of the Government's brief in answer to the original petition it is stated in effect that since no objection was made to the summation at the trial Ansell must be deemed to have waived any objection to the summation. It was not previously presented to the court that the government was and is in error in making this assertion. Because the point is so important and because this may very well be the reason why the court originally denied certiorari on this point, we now bring to the Court's attention the fact that the trial court had ruled in advance of the beginning of the summations by counsel that there were to be no interruptions by objections during the summation of any counsel. Apparently this ruling had been made by the trial court off the record but it is, nevertheless, referred to in the record.

We respectfully direct the Court's attention to the following statement of Ansell's trial counsel made on his motion to set aside the verdict appearing at page 2300 of the trial record.

> " * * * may he (referring to Mr. Block) come in on summation and sum up the way he did? Would he not also thereby become a witness against her? *Your Honor asked us not to interrupt counsel during the summation and none of us did* * * *."

II

The fourth contention presented in the original petition for certiorari at page 36 was, assuming the guilt of the petitioner, she should have been sentenced under the Mis-

demeanor Statute U. S. Code Title 26, Sec. 3616a instead of under Section 1718b of Title 26, the Felony Statute. We cited this Court's decision in *Berra* v. *U. S.*, 351 U. S. 131, as our authority.

The government's brief in answer to the certiorari petition stated at page 17 that, while it was desirable that the questions raised by the *Berra* decision be resolved, this case was not a proper case for it because the point had not been properly raised in the trial court. It must be borne in mind that the trial of this case took place before the *Berra* decision was handed down by this Court.

We wish now to bring to the attention of this Court the following, not heretofore presented, which we submit indicates that the point was properly raised in the trial court.

1. Immediately after the government rested its case, counsel for Rosenblum moved to dismiss the indictment and for judgment of acquittal (R. 1132). At R. 1135-R. 1141 inclusive the point was argued at length with the trial judge finally stating (R. 1140, 1141):

> "• • • You don't need to argue it any further Mr. Block. It is as clear as can be in my mind. If I am wrong you have a remedy."

and further at R. 1141:

> "The Court: That part of your motion is denied insofar as you claim that 3616(a) controls and not 1718b."

At R. 1157 trial counsel for Ansell stated:

> "• • • I too your Honor look at Section 3616 in the same light as did Mr. Block and I move that as another ground for this motion • • •."

At R. 1165-1166 trial counsel for Ansell further stated:

> "I would like it on the record that all points made by Mr. Block on behalf of his defendant are also made by us in behalf of our defendants.
>
> The Court: Yes, Mr. Siegel."

At the close of the entire case all motions made at the close of the government's case were renewed (R. 1937). At R. 2257, *et seq.*, Rosenblum's counsel moved in arrest of judgment and to set aside the verdict on the same grounds. At R. 2305 Ansell's trial counsel in the course of making similar motions stated he wanted to stand "upon all the points made by Mr. Block, except the point about the Grand Jury which affected his own client".

Hence, it is clear that the point was properly raised on the trial. We so contended in the Court of Appeals. In the Court of Appeals the Assistant U. S. Attorney who represented the government was the same assistant who tried the case. He made no contention to the effect that the point was not properly raised. Instead he argued the point on its substantive merits. The Court of Appeals likewise disposed of the point on its substantive merits.

We, therefore, ask for a reconsideration of the petition for certiorari, and on such reconsideration request the Court to grant the petition limited to the first and fourth questions presented in the original petition for certiorari.

Respectfully submitted,

BERNARD AUSTIN,
Attorney for Petitioner.

ISADORE B. HURWITZ,
Of Counsel.

BERNARD AUSTIN, attorney for petitioner hereby certifies that the above petition for rehearing is made and presented in good faith and not for the purpose of delay and that in accordance with Rule 58, Paragraph 2 the petition is restricted to substantial grounds available to the petitioner but not previously presented.

Dated: January 23, 1957.

.....

BERNARD AUSTIN

Office - Supreme Court, U.S.
FILED
FEB 4 1957
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term 1956, No. 576

IRVING A. ROSENBLUM,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OR, IN THE ALTERNATIVE, FOR RECALL OF THE ORDER DENYING CERTIORARI AND A STAY THEREOF

FREDERICK H. BLOCK
Attorney for Petitioner
295 Madison Avenue
New York 17, New York

IN THE

Supreme Court of the United States

October Term 1956, No. 576

IRVING A. ROSENBLUM,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING OR, IN THE ALTERNATIVE, FOR RECALL OF THE ORDER DENYING CERTIORARI AND A STAY THEREOF

Irving A. Rosenblum, the petitioner herein, by his attorney, respectfully prays that this Court grant rehearing of its order of January 14, 1957, denying the petition for certiorari, —— U. S. ——; and that a writ of certiorari, limited, however, as hereinafter set forth, issue to review the judgment of the United States Court of Appeals for the Second Circuit dated August 20, 1956, or, in the alternative, that the order denying certiorari be recalled and stayed as hereinafter set forth; and assigns as reason therefor, the following:

Subsequent to the denial of certiorari in the instant case and on January 28, 1957, this Court granted certiorari in *Frank Costello* v. *United States,* October Term 1956, No. 666, a case which, like the one at bar, involves the legality of a sentence imposed for tax evasion under the 1939 Internal Revenue Code.

Since this Court is now to review the question whether tax evasion is a misdemeanor or a felony, review of this

case, limited, however, to that question, is respectfully asked. The point was preserved for appeal purposes as was shown in the reply brief (pp. 3-4) which petitioner heretofore filed.

Petitioner received a sentence of eighteen months imprisonment which would be illegal if this Court should ultimately hold his offense to be a misdemeanor. He has not commenced to serve his sentence so that review at this time is most appropriate. At the very least, recall of the order denying certiorari and a stay thereof, pending final decision in the *Costello* case, would avoid the injustice that would result if he were to complete service of a sentence that might prove to have been illegally imposed.

Dated: New York, N. Y.
February 1, 1957.

Respectfully submitted,

FREDERICK H. BLOCK
Attorney for Petitioner
295 Madison Avenue
New York 17, New York

Certificate of Counsel

I hereby certify that the foregoing petition is presented in good faith and not for delay; it is restricted to a ground set forth in Rule 58 of the Rules of this Court.

FREDERICK H. BLOCK